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IN THE SUPREME COURT OF THE UNITED STATES.
October Term 1949.

No. .....

O. O. OWENS, ***Petitioner,***

vs.

THE UNITED STATES OF AMERICA, ***Respondent.***

PETITION *for* WRIT *of* CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

May It Please the Court:

Your petitioner, O. O. Owens, respectfully petitions this Honorable Court for a writ of certiorari requiring the United States Court of Appeals for the Tenth Circuit to certify to this Court for its review and determination, the case of O. O. Owens, Appellant, *vs.* The United States of America, Appellee, No. 3870, on the docket of said United States Court of Appeals.

I.

Statement of Matter Involved.

The United States of America, as Plaintiff, brought this action May 19, 1947, against Petitioner, as Defendant, in the United States District Court for the Northern District of

Oklahoma to reduce to judgment an alleged and pretended deficiency in the income taxes of Petitioner for the year 1920 in the amount of $28,260.61, with interest thereon in the amount of $25,872.39, or for a total assessment of $54,-133.00, and alleged that on December 6, 1946, $350.00 had been paid, leaving a $53,783.00 unpaid balance of said assessment with interest thereon and prayed judgment therefor.

The Plaintiff's Petition (R. 3-5) purported to plead and the exhibits attached (R. 154-171) purported to sustain a deficiency regular on its face and determined in a normal, routine and lawful manner and free from defects. It did not disclose that Petitioner had been denied due process of law in the determination of the deficiency nor that said pretended deficiency had been fraudulently determined.

Petitioner, as Defendant, in his Answer (R. 6-19) denied all allegations in the Plaintiff's Petition (except those of purely formal matter) and averred:

That the suit was the direct result of, and arose out of, frauds extrinsic to the Record of the proceeding perpetrated pursuant to a prolonged and continuous series of conspiracies to blackmail and extort $100,000.00 from Petitioner by malicious indictment and malicious prosecution; and

With particularity Petitioner pleaded the ultimate facts which demonstrated said deficiency had been fraudulently determined, and that he had been denied uniform application and equal protection of the law and had also been denied due process of law; and that in the first instance the alleged and pretended deficiency exceeded $54,000.00, but that shortly thereafter Respondent's agents and representatives in the Treasury Department and in the Bureau of Internal Revenue had reduced such alleged and pretended

deficiency to $36,116.86, from which Petitioner appealed April 24, 1926, to the Board of Tax Appeals (R. 347-353);

That while said appeal pended before the Board of Tax Appeals Respondent's representatives in and attorneys for the Bureau of Internal Revenue, by collusion, and fraud upon Petitioner, conspired with an attorney, who was not authorized to represent Petitioner, to fraudulently and without Petitioner's knowledge, consent or permission, enter his appearance as Petitioner's attorney before the Board of Tax Appeals and to fraudulently stipulate falsely stated facts as the true facts of the case, which false statements of fact were designed and intended by said conspirators to perfectly conform to and to completely sustain such alleged, pretended and fraudulent deficiency and also designed and intended to completely destroy Petitioner's defense thereto;

That while said unauthorized attorney pretended to represent Petitioner—without Petitioner's knowledge, consent or permission and in a pretended hearing before the Board of Tax Appeals of which Petitioner or his attorney of record had no notice or knowledge—but was actually representing Respondent pursuant to the aforesaid conspiracy, said unauthorized attorney and Respondent's attorney fraudulently stipulated the falsely stated facts designed and intended to destroy Petitioner's defense and to sustain the fraudulent pretended deficiency; that said unauthorized attorney immediately thereafter abandoned the defense to such deficiency while still pretending to represent Petitioner, defaulted Petitioner and permitted a decision adverse to Petitioner and in favor of the Commissioner of Internal Revenue to be entered by the Board of Tax Appeals;

That thereafter Petitioner, then uninformed of and not suspecting such collusion, conspiracy and fraud, rely-

ing upon the misleading and false written statements of such unauthorized attorney and believing that such adverse decision had resulted from accident, confusion, inadvertence or mistake compelled such unauthorized attorney to procure the vacation of such adverse decision by stipulation with the Chief Counsel for Respondent's Bureau of Internal Revenue;

That after such stipulation had been signed, sealed and filed with Respondent's Board of Tax Appeals an attorney for Respondent, by forgery, altered and changed such stipulation to provide exactly the opposite of the original intent and purpose thereof and also designed to make final and conclusive the decision of the Board of Tax Appeals sustaining said fraudulent deficiency, based upon the false statements of fact contained in the stipulation fraudulently entered by the unauthorized attorney pretending to represent Petitioner and Respondent's attorney for the Bureau of Internal Revenue;

That because of delays, for which Petitioner was not responsible, five years elapsed before Petitioner discovered the aforesaid forgery; that upon such discovery he immediately commenced and diligently proceeded to attempt to vacate such fraudulently determined deficiency but that Respondent's representatives in and attorneys for the Bureau of Internal Revenue vigorously resisted Petitioner's efforts and vigorously sought to retain the benefits of such fraudulent deficiency so that eight years and four months elapsed from the time of the first fraudulent act, subsequently discovered by Petitioner, until he succeeded, July 29, 1938, in procuring an order of the Board of Tax Appeals vacating and setting aside such fraudulent deficiency and ostensibly granting Petitioner a hearing on the merits of his defense thereto;

That in a later hearing before the Board Respondent's representatives in and attorneys for the Bureau of Internal Revenue and also the Board of Tax Appeals conceded the correctness and sufficiency of Petitioner's defense to certain items or transactions upon which part of such alleged, pretended and fraudulent deficiency was based, sufficient in amount to reduce the same to $28,260.61; that Petitioner's other evidence was a complete defense to the $28,260.61 residue of said fraudulent deficiency but that in deciding the case the Board of Tax Appeals abandoned the record and misstated, distorted and falsified the true facts revealed by the Record of Petitioner's defense to the $28,260.61 residue of such fraudulent deficiency, resorted to the false statements of fact previously stipulated by attorneys for the Bureau of Internal Revenue and said unauthorized attorney as a basis for its decision, and by so doing affirmed and pretendedly sustained the $28,260.61 residue of the aforesaid fraudulent deficiency originally determined in the first instance in an amount exceeding $54,000.00;

That on review the Circuit Court of Appeals rendered an opinion, contradictory and void on its face, in conflict with all previous decisions by all courts of the land of the questions of law applicable to Petitioner's defense, announcing a new and special rule of law as decisive of the case, affirming and sustaining the decision of the Board of Tax Appeals and said deficiency;

That of the $53,783.00 alleged to be due under the aforesaid pretended and fraudulent deficiency more than $14,000.00 thereof represented interest on $28,260.61 for the eight years and four months Petitioner had been denied a hearing or an opportunity to be heard, as a result of the collusion, conspiracy and frauds of Respondent's representatives in and attorneys for the Bureau of Internal Revenue

and said unauthorized attorney, who, without Petitioner's knowledge, consent or permission, had pretended to represent Petitioner but had actually misrepresented and defrauded him; that Petitioner denied all liability under, and the validity of, said deficiency and alleged as to any deficiency, however small, Respondent could not lawfully, or in good conscience and in equity, unjustly enrich itself by collecting interest thereon for such eight years and four months Petitioner had been denied a hearing or opportunity to be heard as result of the collusion, conspiracy and frauds of the representatives in and attorneys for the Bureau of Internal Revenue and such unauthorized attorneys.

Petitioner also specifically denied the payment of $350.00, or any other sum, as alleged had been paid by him and averred that such payment, if made, had been made by others without his knowledge, consent or approval; that he denied responsibility therefor, repudiated such alleged payment as the unauthorized act of others unknown to him and refused to be bound thereby, and prayed judgment against Respondent, and that the Trial Court restrain Respondent's agents, subordinates, attorneys or other representatives from enforcing or attempting to enforce such alleged deficiency in tax and that upon final hearing said deficiency be vacated, set aside and held for naught.

Respondent filed a motion (R. 19-20) to strike substantially all of Petitioner's Answer, particularly all allegagations of conspiracy, collusion and fraud, including the forgery, "all upon the grounds and for the reasons that the same is redundant, immaterial, impertinent and scandalous." The Trial Court sustained the motion (R. 20).

Petitioner thereupon filed his Amended Answer to Complaint (R. 20-23) in which, with the exception of the allega-

tions of formal matter, he denied all allegations of the complaint and in general terms repleaded all allegations of fact contained in his Answer and averred that the deficiency sued upon had not been lawfully determined, that he had been denied uniform application and equal protection of the law and due process of law in the original determination in the first instance of said deficiency and in the subsequent pretended affirmation of the residue or portion thereof and further denied the payment of the aforesaid $350.00 or any other sum and averred that such payment, if made, had been made by others without his knowledge, consent or approval, that he repudiated such alleged payment and refused to be bound thereby and prayed for the same relief prayed for in his Answer.

In the pre-trial conference (R. 24-25) and in the trial (R. 123-124; 784-791) Petitioner demanded that Respondent produce certain records—including some of his own records which, years before, had been stolen or surreptitiously taken from him or his attorney of record before the Board of Tax Appeals and delivered to the aforesaid unauthorized attorney or to the representatives of and attorneys for the Bureau of Internal Revenue, and which at all times since had been held by representatives of Respondent—then in the exclusive custody or control of Respondent, and indispensable to his full and complete defense be produced by Respondent; and Petitioner also demanded that Respondent produce, for interrogation, certain of its agents in the Bureau of Internal Revenue whose oral testimony was also indispensable to Petitioner's full and complete defense (R. 784-791), but Respondent's representative, the Commissioner of Internal Revenue, and its attorneys for the Bureau of Internal Revenue at all times not only refused to produce any of the records demanded and refused

to produce the witnesses or permit them to testify but, on the contrary, suppressed all such documentary and oral evidence demanded by Petitioner and indispensable to his full and complete defense.

Petitioner offered as much of his own testimony and as much of the testimony of other witnesses as the Trial Court would permit (R. 50-153) over Respondent's objection. He also offered in evidence 92 documentary exhibits (R. 154-783) which proved the allegations and demonstrated the collusion, the conspiracy and frauds (R. 355-394) including forgery (the forgery is not observable from the printed Record but is observable from photostatic copy of Ex. 42 (R. 395), hereto attached and marked EXHIBIT "A"), the malicious indictment (R. 309), malicious prosecution (R. 317-341), the fraudulent determination in the first instance of said pretended deficiency for $54,852.90 (R. 342-347) and the fraudulent appearances and conduct of TWO unauthorized attorneys who had pretended to represent Petitioner before the Board of Tax Appeals, but who, in conspiracy with representatives of and attorneys for Respondent's Bureau of Internal Revenue, actually defrauded him (R. 355-394).

Such documentary and oral evidence proved and demonstrated that the FIRST of such TWO unauthorized attorneys, without Petitioner's knowledge, consent or permission, had, on March 27, 1930, entered his fraudulent appearance before the Board of Tax Appeals as Petitioner's attorney in said case (R. 355), had caused the same to be stricken from an early trial docket and the trial thereof indefinitely postponed (R. 355-356); that such first unauthorized attorney was at all times unknown to Petitioner (R. 62); that Petitioner had never heard of such first unauthorized

attorney until such fraudulent conduct was discovered and had never since met or communicated with him (R. 62).

Such documentary and oral evidence also proved and demonstrated that during such postponement of the trial of Petitioner's case before the Board and without Petitioners knowledge, consent or permission and without the knowledge, consent or permission of Petitioner's attorney of record, Respondent's representatives in and attorneys for the Bureau of Internal Revenue had prepared (R. 365-375; 760-783) the false statements of fact (R. 375-385) designed and intended to destroy Petitioner's defense to the fraudulent deficiency in the then asserted amount of $36,116.86 and further designed and intended to completely sustain said deficiency; and also demonstrated that said unauthorized attorney knew absolutely nothing about the substance or contents of such fraudulent stipulation but did know its intended effect (R. 365-375; 760-783).

Such evidence also proved and demonstrated that Respondent's representatives in and attorneys for the Bureau of Internal Revenue during such postponement had conspired with such first unauthorized attorney to withdraw his fraudulent appearance and had also conspired with such second unauthorized attorney to immediately enter his unauthorized and fraudulent appearance as Petitioner's attorney and to immediately thereafter fraudulently stipulate that the false statements of fact (in which no reference whatever was made to the most material and decisive facts of the Petitioner's defense) were all the true facts of Petitioner's case and his defense to such alleged and pretended deficiency (R. 355-385; 760-783).

Such oral and documentary testimony also proved and demonstrated, in detail and step by step (R. 355-365), the

frauds of the various conspirators, the means devised and employed for the fraudulent substitution of such unauthorized attorneys for Petitioner's attorney of record (R. 760-783), the knowledge of Respondent's representatives in and attorneys for the Bureau of Internal Revenue that such substitution of attorneys was fraudulent, was unknown to and unauthorized by Petitioner, and that Petitioner was not heard nor permitted to be heard in his defense (R. 355-375; 760-783); that thereafter such second unauthorized attorney abandoned all pretense of making Petitioner's defense to such fraudulent deficiency, defaulted Petitioner and permitted a decision adverse to him and sustaining the fraudulent deficiency for $36,116.86 to be rendered by the Board of Tax Appeals (R. 386; 760-783).

Such oral and documentary evidence also proved and demonstrated that after such fraudulent deficiency had been sustained by the Board of Tax Appeals and, in response to Petitioner's demand (R. 760-783), had been vacated by stipulation between the second of the aforesaid unauthorized attorneys and the Chief Counsel for the Bureau of Internal Revenue, the Assistant Chief Counsel who had participated with such second unauthorized attorney in fraudulently stipulating the falsely stated facts, by forgery (Ex. 42, R. 395; Ex. A hereto), had altered and changed the aforesaid stipulation vacating such adverse decision and thereupon procured an Order from the Board conforming to and designed and intended to effectuate such forgery; and

That because of delays, for which he was not responsible, Petitioner, until the latter part of 1937, had no knowledge of such forgery or the fact that the fraudulent deficiency had been reinstated thereby (R. 402-409); that upon such discovery he immediately commenced and by diligence, and over the violent objections and vigorous ef-

forts of Respondent's representatives and attorneys, succeeded in having the Board's affirmance of such fraudulent deficiency for $36,116.86 vacated and set aside a second time and in being granted a hearing before the Board of Tax Appeals on the merits of his defense thereto (R. 409-411).

Such oral and documentary evidence also proved and demonstrated that during the later hearing before the Board on the merits of Petitioner's defense Respondent's attorneys and the presiding Board Member conceded the correctness of Petitioner's evidence sufficient to reduce such fraudulent deficiency to $28,260.61 (R. 411-423); that the attorney for the Commissioner of Internal Revenue then sought to require Petitioner to re-stipulate the falsely stated facts previously fraudulently stipulated in the first pretended hearing before the Board by the Commissioner's attorney and the second of the unauthorized attorneys who pretended to represent Petitioner (R. 428-437); that Petitioner refused so to do and offered his oral and documentary evidence which demonstrated the incorrectness of such fraudulent stipulation, and which also proved and established material facts, decisive of Petitioner's defense, that had been entirely omitted from the aforesaid fraudulent stipulation (R. 423-550), and thereby made a complete defense to the $28,260.61 residue of said fraudulent deficiency.

Such documentary and oral evidence also proved and demonstrated that Petitioner then had no knowledge of the conspiracy between Respondent's representatives and attorneys and such unauthorized attorneys; that he properly made no issue of misconduct of Respondent's representatives in and attorneys for the Bureau of Internal Revenue and of such unauthorized attorneys, other than the fact that he had been denied a hearing and opportunity to be heard for eight years and four months because of the intercession of such unauthorized attorneys, and that, having knowledge of such lack of authority, Respondent could not lawfully, or in good conscience and in equity, collect interest on any deficiency, however small, for such eight

years and four months Petitioner had been denied a hearing or an opportunity to be heard (R. 423-585).

Such oral and documentary evidence also proved and demonstrated that not until March 26, 1940, four months and sixteen days after the hearing before the Board on the merits of his defense was closed, did Petitioner become aware of the fact that the substitution of the unauthorized attorneys, the stipulation of the falsely stated facts and all the other frauds later alleged and proven, were, in fact, frauds flowing from a perfectly designed and well concealed conspiracy between Respondent's representatives in and attorneys for the Bureau of Internal Revenue and such unauthorized attorneys and others (R. 357-359; 585, 602-605).

Such oral and documentary evidence also proved and demonstrated that immediately upon such discovery Petitioner sought to reopen the case before the Board, sought to amend his pleadings and to offer the newly discovered proof of such collusion, conspiracy and frauds (R. 357-359; 585, 602-605), but the Board denied him leave so to do (R. 623) and thereafter, in deciding the case the Board abandoned the Record of Petitioner's defense, misstated, distorted, garbled, scrambled and falsified the facts, resorted to the identical false statements of fact fraudulently stipulated in the first pretended hearing by the second unauthorized attorney and Respondent's Chief Counsel as a basis and ground for its decision (R. 611-623; 623-665), pretendedly affirmed the $28,260.61 residue of said fraudulent deficiency for $36,116.86 (R. 623) and thus effectuated (R. 665-668), to the extent of $28,260.61 plus approximately $23,750.00 interest then accrued thereon, the conspiracy and frauds of Respondent's attorneys and the unauthorized attorneys who had previously pretended to represent Petitioner.

Other than its six exhibits Respondent offered no evidence, only perfunctorily cross-examined Petitioner and his witnesses and made no effort to disprove or refute any of Petitioner's oral and documentary evidence, which stands undenied in the Record.

During the trial, and without examining, considering or knowing the contents of the great bulk of documentary exhibits which conclusively proved and demonstrated the conspiracy and frauds perpetrated pursuant thereto, immediately theretofore offered in evidence by Petitioner, and notwithstanding Respondent had at all times ignored Petitioner's demands and the Trial Court's orders to produce the records and witnesses demanded by Petitioner and had continued to suppress all such oral and documentary evidence indispensable to the full and proper presentation by Petitioner of his defense, the Trial Court made findings of fact adverse to Petitioner and in favor of Respondent (R. 128-131).

Such oral and documentary evidence also proved and demonstrated that on review by the Circuit Court of Appeals Respondent, as Appellee, withheld until just before the argument service of its brief on Petitioner, and by such brief and its argument Respondent presented the issue of capital investment not considered or decided by the Board but which the Board in its opinion expressly refused to consider or to find the facts thereof (R. 623); that the Circuit Court of Appeals, without jurisdiction so to do, made its own independent findings of the facts of such newly raised issue, refused to decide the decisive question of law raised by such facts found by the Court and arbitrarily and capriciously affirmed the Board's decision and said deficiency (*Owens* v. *Commissioner*, 125 F. (2d) 210 at 212, 213).

II.

This Court Has Jurisdiction.

(*1*) This petition for writ of certiorari is prosecuted pursuant to the provisions of Title 28, U. S. C., Sec. 1254.

(*2*) The opinion (R. 796-799) and judgment (R. 800) of the United States Court of Appeals were filed November 1, 1949. Order was entered December 1, 1949, staying mandate for thirty days from December 5, 1949, and extending

time to file petition for certiorari to January 5, 1950. Such Order was entered after the Record was printed and therefore does not appear in the Record of the proceedings in said Court of Appeals.

III.

Question Presented.

The question in this case is whether the United States of America may retain the benefits of a judgment against Petitioner which it obtained by denying Petitioner the due process of law guaranteed him by Amendment V to the Constitution, which denial of due process resulted from collusion and frauds perpetrated upon Petitioner by agents and representatives of and attorneys for Respondent in conspiracy with others, and which denial of due process also resulted from the usurpation and exercise by the Court of Appeals of jurisdictional powers which it did not have.

IV.

Reasons Relied Upon for Allowance of the Writ.

The writ of certiorari should be allowed because:

(*a*) the Court of Appeals has rendered a decision in conflict with other Courts of Appeals on the same matter;

(*b*) said Court of Appeals has decided a federal question in conflict with applicable decisions of this Court;

(*c*) said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision.

Said decision is in conflict with Amendment V to the

Constitution and is in conflict with decisions of this Court and of other Courts of Appeals, on the same matter in the following cases: *Marine Ins. Co. of Alexandria* v. *Hodgson*, 7 Cranch (U. S.) 332, 3 L. ed. 362; *U. S.* v. *Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Luikart* v. *Farmers' Lumber Co.*, (10 Cir.) 38 F. (2d) 588; *Horton* v. *Stegmyer*, (8 Cir.) 175 Fed. 758, opinion by Judge WALTER H. SANBORN; *Barnett* v. *Kunkel*, (8 Cir.) 259 Fed. 394, 400; *Burke* v. *Murphy, et al.*, (2 Cir.) 109 F. (2d) 572, 574, 575; *Windsor* v. *McVeigh*, 93 U. S. 274, 280, 281, 23 L. ed. 914 at 917; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 689, 698, 39 L. ed. 312, 316; *Georgia Railway & Electric Co.* v. *Decatur*, 295 U. S. 165, 168, 171, 79 L. ed. 1365, 1368, 1369; *Saunders* v. *Shaw*, 244 U. S. 317, 61 L. ed. 1163; *Hovey* v. *Elliott*, 167 U. S. 409, 42 L. ed. 215; *Ex parte Jackson*, 263 Fed. 110, app. dismissed in 267 Fed. 1022; *Chisholm* v. *House*, 167 F. (2d) 633, 642; *Helvering* v. *Gowran*, 302 U. S. 238; *Helvering* v. *Rankin, et al.*, 295 U. S. 123, 79 L. ed. 1343; *Helvering* v. *Nat. Grocery Co.*, 304 U. S. 282, 82 L. ed. 1346; *Helvering* v. *Tex. Penn. Oil Co.*, 300 U. S. 481, 81 L. ed. 755, 756; *Helvering* v. *Wood*, 309 U. S. 344, 84 L. ed. 796, 799; *Levitt & Sons* v. *Nunan*, (2 Cir.) 142 F. (2d) 795, 160 F. (2d) 209, 210; *Ross* v. *Commissioner*, 169 F. (2d) 483, 496 (opinion by Justice FRANKFURTER; *United States* v. *Lee*, 106 U. S. 196, 220, 27 L. ed. 171, 182; Cooley, Constitutional Limitations, 6th Ed., p. 452.

Since *United States* v. *Throckmorton* this Court has uniformly held that where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or even where an attorney regularly employed corruptly sells out his client's interest to the other side, or in any similar case where there was in fact no adversary trial and the unsuccessful party has been prevented by the successful party from fully presenting his case, the successful party may not retain the benefits of a judgment so obtained.

In this case attorneys for the Commissioner of Internal Revenue acting for the advantage and benefit of Respondent, independently or in conspiracy with two attorneys neither of whom had been employed or authorized by Petitioner to represent him, connived to defeat Petitioner, to sustain and enforce a fraudulent deficiency and to confiscate Petitioner's property for Respondent without just compensation therefor by denying Petitioner a hearing or opportunity to be heard in defense against such fraudulent deficiency.

At the time the first of such unauthorized attorneys entered his fraudulent and pretended appearance before the Board of Tax Appeals as Petitioner's attorney Petitioner had never heard of such person, and up to now Petitioner has never met or received any communication from him, and notwithstanding Petitioner's continuous charges, during the past twelve years, of collusion, conspiracy and fraud leveled at such person he has never identified himself to Petitioner. Neither has he voluntarily appeared nor been produced by the Commissioner of Internal Revenue or Respondent at any of the numerous heated hearings before the Board or the courts.

Petitioner doubts such person ever existed. Petitioner is convinced that such mythical attorney's appearance for him was merely a device and fraud employed by the attorneys for the Commissioner of Internal Revenue and Respondent to gain control of both sides of the controversy pending before the Board and to make certain the falsely stated facts of Petitioner's defense to such fraudulent deficiency, thereafter fraudulently stipulated with the second unauthorized attorney who pretended to represent Petitioner, would be so stipulated and destroy Petitioner's defense

and create and provide the basis for a decision by the Board of Tax Appeals sustaining such deficiency.

The Board's decision sustaining such fraudulent deficiency in a proceeding where Petitioner was "represented" by such stranger or mythical character would obviously deny due process of law and would have no standing in any court.

The "switch" of unauthorized attorneys and the fraudulent substitution of the second, even though he did exist, for Petitioner's attorney of record before the Board, and the subsequent connivance at Petitioner's defeat—by attorneys for the Commissioner of Internal Revenue and Respondent in conspiracy or cooperation with such second unauthorized attorney and their fraudulently stipulating falsely stated facts as all the true facts of Petitioner's defense and omitting any reference to the most material facts decisive of Petitioner's defense—did not supply the requisite due process of law.

Although Petitioner was thereafter ostensibly relieved from the aforesaid frauds and the effect of the fraudulently stipulated, falsely stated facts of his defense and was ostensibly granted a hearing on the merits of his defense, nevertheless, at a later hearing and by its decision the Board held Petitioner was bound by the identical falsely stated facts previously fraudulently stipulated by the Commissioner's and Respondent's attorneys and the aforesaid second unauthorized attorney, and thus a second time the Board denied Petitioner due process of law.

Due process of law was not afforded Petitioner by two, three or more hearings where, in each, he was denied the benefit of his defense, was held bound by the previous frauds perpetrated upon him and was also denied the right to have his case determined upon its own true facts.

Due process of law is not afforded where one of the parties controls both sides of the controversy, suppresses the true facts and by conspiracy and fraud substitutes falsely stated facts upon which the controversy is decided. Nor does subsequent affirmance, by an appellate court, of a decision or judgment cure the defect of such a denial of due process in the first instance.

This case presents the question: Are public officials, agents and attorneys for the Government bound by the same laws, by the same rules of conduct and procedure in their dealings with citizens as are citizens in their dealings with one another—or, may public officials, agents and attorneys for Respondent connive to rob a citizen and to confiscate his property without due process of law and just compensation but by conspiracy and fraud, merely because they are such public officials, agents or attorneys for the Government?

If the latter be the law of this country, which, in effect, the Board of Tax Appeals and Court of Appeals has held in this case, it sanctions a tyranny which has no existence in any other government which has a just claim to well regulated liberty and the protection of personal rights, and it makes Amendment V to the Constitution a delusion, a snare and hollow mockery. Neither can private honesty long survive when such public dishonesty is thus legalized.

Respectfully submitted,

O. O. Owens,
Tulsa, Oklahoma,
Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The Trial Court did not render a written opinion. The Trial Court's Findings of Fact and Conclusions of Law appears at pages 28 to 30 of Record, and Journal Entry of Judgment is at pages 30 and 31 of Record. Opinion of the Court of Appeals appears at pages 796 to 799 of Record.

II.

Jurisdiction of This Court.

The grounds of jurisdiction of this Court are stated in Paragragh II of Petition for Writ of Ceritorari.

III.

Statement of the Case.

A sufficient statement of the case has been made in Paragraph I of Petition for Certiorari, which for brevity is not repeated here.

IV.

Specifications of Error.

The errors of the United States Court of Appeals for the Tenth Circuit relied upon for reversal of its judgment in this case are stated in Paragraph IV of Petition for Certiorari, and are adopted by reference as a part of this brief.

V.

ARGUMENT.

It is extremely significant that in the Trial Court Respondent, as Plaintiff, did not deny any of Petitioner's allegations of collusion, conspiracy and fraud through and by

which the fraudulent deficiency was determined in the first instance by the Commissioner of Internal Revenue, his agents and servants, and through and by which it was subsequently affirmed and sustained by the Board.

Instead of denying such charges or allegations Respondent, as Plaintiff, filed its motion to strike all such allegations, "all upon the grounds and for the reasons that the same is redundant, immaterial, impertinent and scandalous."

In the trial Respondent, as Plaintiff, rested its case upon the proposition that the deficiency in suit was final, could not be collaterally attacked, offered no evidence except its exhibits, objected to the introduction of any evidence by Petitioner, only perfunctorily cross-examined Petitioner's witnesses, refused to produce witnesses and records, some of which were Petitioner's own records in Respondent's possession or control, and suppressed all such documentary and oral evidence notwithstanding Petitioner's demands that such witnesses and records be produced and the Trial Court's orders to produce them.

Nevertheless Petitioner's evidence proved and demonstrated the fraudulent determination of the deficiency in the first instance by the Commissioner of Internal Revenue, the fraudulent methods and devices employed by the agents and attorneys for Respondent in their use of, or cooperation and conspiracy with, attorneys unauthorized to represent Petitioner but while pretending to represent him conniving at his defeat by frauduently stipulating false statements of fact upon which the deficiency and Petitioner's defense thereto were purportedly based.

Petitioner's documentary and oral evidence also proved and demonstrated that the first decision of the Board sus-

taining such fraudulent deficiency rested solely upon such false statements of fact fraudulently stipulated and was procured exclusively by the frauds of attorneys and agents for the Commissioner of Internal Revenue and Respondent in conspiracy or cooperation with such unauthorized attorneys.

In consequence, the first decision of the Board affirming the fraudulent deficiency was so obviously void the Board was forced to vacate it and set it aside notwithstanding the violent objections and protests of the Commissioner and his vigorous extended efforts in opposition.

The alteration, by forgery committed by one of Respondent's attorneys (Ex. A hereto)—of the stipulation between the Commissioner's Chief Counsel and the second unauthorized attorney providing that the Board's first decision sustaining the deficiency should be vacated and set aside—was merely typical of all the other fraudulent conduct and acts of the Commissioner's and Respondent's agents and attorneys throughout this entire case.

If there was any insufficiency in Petitioner's proof in the trial of this case, that insufficiency rests solely upon the fact that Petitioner was denied the right to make his full proof by Respondent's refusal, after being ordered by the Trial Court so to do, to produce witnesses and documentary evidence demanded by Petitioner and throughout the entire course of the trial, including a seven and one-half months' recess thereof, the suppression by Respondent of all such evidence.

Petitioner's evidence proved and demonstrated the first pretended hearing before the Board in which the Petitioner was "represented" by the second unauthorized attorney was a farce and not a hearing; that at the second pretended

hearing before the Board in the latter part of which Petitioner represented himself (R. 423-550), the Board member and the attorney for Respondent and the Commissioner sought to require Petitioner to submit his defense upon the stipulation of falsely stated facts fraudulently stipulated in the first pretended hearing before the Board by the attorney for the Commissioner and Respondent and the second unauthorized attorney pretending to represent Petitioner (R. 428, 437); that Petitioner refused to be so entrapped, produced his proof demonstrating the incorrectness of the falsely stated facts in such fraudulent stipulation (R. 438-550) and such fraudulent stipulation so corrected and revised was, so far as applicable, at the Board's order admitted in evidence; and,

That Petitioner, also offered voluminous additional documentary evidence, his own testimony and the testimony of other witnesses, none of which was denied or refuted by the Commissioner, and that such evidence was a full and complete defense to said fraudulent deficiency.

Petitioner's evidence in the trial of the instant case also proved and demonstrated that before the Board in such second pretended hearing the Commissioner relied exclusively upon his contention that Petitioner was on the cash basis of reporting income for taxation (R. 542-550); that the return upon which the fraudulent deficiency had been previously determined was a tentative return which disclosed on its face that it was incomplete, was filed by Petitioner with a declaration by Petitioner of his intention to complete it as soon as possible (R. 83-93; 253-263; 542-547), but that the Commissioner denied and deprived Petitioner the right and opportunity to file a complete, corrected and amended return before he fraudulently determined the deficiency in controversy (R. 83-93; 97-100).

Such evidence in the Trial Court also proved and demonstrated that notwithstanding the Commissioner suppressed documentary and oral evidence in his custody and under his control demanded by Petitioner, and after Petitioner had nevertheless made a full defense to said fraudulent deficiency, the Board of Tax Appeals to sustain the $28,260.61 residue of said fraudulent deficiency ignored and disregarded the evidence adduced at such second pretended hearing, reached back and used the identical falsely stated facts, fraudulently stipulated in the first pretended hearing, as a basis and ground for its decision and thus again denied Petitioner due process of law by refusing to consider the true facts established by Petitioner's evidence and refusing to base its decision thereon; and by so doing the Board of Tax Appeals effectuated, to the extent fo $28,260.61, plus approximately $23,750.00 interest then accrued thereon, the conspiracy and frauds of the Commissioner's and Respondent's attorneys and the unauthorized attorneys who pretended to represent Petitioner.

Such evidence also proved that on review by the Court of Appeals Respondent, as Appellee, in defense and justification of the Board's decision sustaining the residue of the fraudulent deficiency, raised an issue Respondent had previously abandoned before the Board, which the Board expressly excluded from its consideration and refused to find the facts thereof and refused to decide such issue (R. 623); that, nevertheless, the Appellate Court, without jurisdiction so to do made its own independent findings of the facts of such issue and without deciding the decisive question of law arising out of the facts so found the Court arbitrarily and capriciously affirmed the Board's decision (see *Owens* v. *Commissioner,* 125 F. (2d) 210, at 213).

This is the deficiency upon which the Respondent here-

in, as Plaintiff, sought and recovered the judgment herein involved.

The judgment of the Court of Appeals in *Owens* v. *Commissioner* (125 F. (2d) 210) was beyond and without its jurisdiction, was void for that reason and also because Petitioner was denied due process of law, and Respondent may and should be denied the benefit thereof upon either direct or collateral attack.

The decision and judgment of the Court of Appeals in *Owens* v. *Commissioner,* (125 F. (2d) 210) discloses upon its face that it was not within the jurisdictional power granted to it by the law of its organization. The jurisdictional power granted to said Court of Appeals on review of a Board of Tax Appeals decision confers only power to affirm, modify or reverse, with or without remanding the case for a rehearing (26 U. S. C., Sec. 1141(c)).

Said Appellate Court was without jurisdictional power to make findings of fact in *Owens* v. *Commissioner,* 125 F. (2d) 210, but was limited to ascertaining whether there was evidence to support the findings of fact and decision of the Board of Tax Appeals. Said Appellate Court had no jurisdictional power to make an independent determination of issues of fact not determined by the Board, nor pass on the weight of the evidence, nor choose between possible inferences that might have arisen.

Said Appellate Court sits as a Court of Review only. It had no power to make findings of fact and an independent determination of the case even though the findings omitted by the Board might have been supplied from an examination of the Record. *Helvering* v. *Rankin, et al.,* 295 U. S. 123, 79 L. ed. 1343; *Helvering* v. *Gowran,* 302 U. S. 238; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 82 L. ed. 1346, 1356; *Hel-*

vering v. *Tex. Penn. Oil Co.*, 300 U. S. 481, 81 L. ed. 755, 756; *Helvering* v. *Wood*, 309 U. S. 344, 84 L. ed. 796, 799; *Patton, et al.*, v. *Comm. of Int. Rev.*, (6 Cir.) 168 F. (2d) 28; *Ross* v. *Comm.*, 169 F. (2d) 483, 496 (opinion by Justice FRANKFURTER); *Levitt & Sons* v. *Nunan* (142 F. (2d) 795; 160 F. (2d) 209).

Mr. Justice GRAY, speaking for the Court in *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896, said:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

A full hearing requires that the parties be afforded opportunity to introduce all their evidence, that all such evidence be considered and a judicial determination of the issues be made upon all such evidence by a court having jurisdiction, all after proper notice, *Windsor* v. *McVeigh*, 93 U. S. 274; and a judgment rendered in a proceeding where such safeguards are not provided and where such procedure is not followed is subject to being vacated upon either direct or collateral attack. *Rapeer* v. *Colpoys, United States Marshal*, (App. D. C.) 85 F. (2d) 715, 717; *United States* v. *Walker*, 109 U. S. 258, 266, 3 S. Ct. 277, 27 L. ed. 927; *Robinson, et al.*, v. *Elder*, (9th Cir., Nev.) 78 F. (2d) 817, 818; *Reynolds* v. *Stockton*, 140 U. S. 254, 268, 35 L. ed. 464, 468.

The Trial Court's refusal to consider competent evidence, and its prematurely making findings of fact before the conclusion of the trial and before consideration of all the evidence introduced by Petitioner was a denial of due process of law which denied Petitioner a full hearing on those issues.

In the course of the trial and without examining or con-

sidering or knowing the content of the great bulk of documentary evidence offered by Petitioner, and notwithstanding Respondent continued to refuse to produce witnesses under its control and records in its exclusive custody or control demanded by Petitioner and ordered produced by the Court, the Trial Court made findings of fact favorable to Respondent upon the issues of conspiracy, collusion and fraud, and further found that such issue and all the evidence in support thereof had been previously considered and decided by the Appellate Court in *Owens* v. *Comm'r.*, 125 F. (2d) 210.

Such findings of fact were made notwithstanding that the evidence before the Trial Court proved and demonstrated that no such issues had been previously presented to or considered by the Appellate Court, but that on the contrary after the second pretended hearing before the Board was concluded Petitioner discovered that all the prior acts of the unauthorized attorneys and the attorneys for the Commissioner and Respondent flowed from a perfectly designed and well concealed conspiracy, and by motion Petitioner sought, but was denied leave by the Board, to reopen the case and make proof of said conspiracy, collusion and frauds.

The Trial Court's findings of fact during the course of the trial and his subsequent judgment based thereon, upon the ground among others,

> "• • • Those are my findings of fact and conclusions of law, and frankly I must say this, that so far as I am concerned, the Circuit Court of Appeals is the big Court." (R. 119),

was a denial of due process of law to Petitioner and the judgment based thereon was void.

To permit Petitioner to introduce evidence and then decide the case without examining or considering that evi-

dence or even finding out what that evidence is, would, in the language of Mr. Justice STORY, amount,

> " 'to little more, in common sense and common honesty, than the sentence of the tribunal which punishes first and then hears the party—*castigatque, auditque* * * *, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding'." *Windsor* v. *McVeigh*, 93 U. S. 274, 280, 281, 23 L. ed. 914 at 917.

A comparison of the Trial Court's conduct in this case with that of the Board in its second decision sustaining the $28,260.61 residue of the fraudulent deficiency reveals a remarkable similarity of method employed to deny Petitioner due process of law.

The Board permitted Petitioner to offer all his proof except his own and other records then in the custody or control of the Commissioner, which latter evidence the Commissioner suppressed. Petitioner's evidence so introduced was a full and complete defense. The Board ignored that evidence and resorted to the identical falsely stated facts fraudulently stipulated in the first pretended hearing as a basis for its decision.

In the trial of this case the Court, without examining or considering or knowing the contents of Petitioner's documentary evidence, made findings of fact upon the issue of conspiracy, collusion and fraud. The method was the same, only the technique was different. In both hearings Petitioner was not only entitled to a full hearing of all evidence essential to his defense but he was also entitled to have all of his evidence examined and considered, and in each instance he was entitled to have his case decided upon its own true facts. In neither instance did Petitioner's evidence receive consideration.

Any departure from those recognized and established requirements of the law, however close the apparent adherence to mere form in method of procedure which has the effect to deprive a litigant of a constitutional right, is as much an excess of jurisdiction as where there exists an inceptive lack of power, or as was said in *Postal Teleg. Cable Co.* v. *Adams,* 155 U. S. 689, 698, 39 L. ed. 312, 316:

> "The substance and not the shadow determines the validity of the exercise of the power."

To the same effect: *Georgia Railway & Electric Co.* v. *Decatur,* 295 U. S. 165, 168, 171, 79 L. ed. 1365, 1368, 1369; *Saunders* v. *Shaw,* 244 U. S. 317, 61 L. ed. 1163; *Hovey* v. *Elliott,* 167 U. S. 409, 42 L. ed. 215.

The Trial Court in this case found it hard to believe that the government (public officials) would be guilty of fraud or conspiracy (R. 131). Judge Cooley in his treatise on Constitutional Limitations was not so incredulous. He said (6th ed., page 452):

> "* * * In judicial investigations, the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce proofs. The most formal conveyance may be a fraud or a forgery. Public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes * * *"

See also: *Wood* v. *Wilson,* 10 Okl. 279, 61 Pac. 1045, 1046, 1047.

Respondent's refusal to produce witnesses and records and its suppression of evidence in its exclusive custody and under its control was a denial of due process of law.

Respondent's refusal to produce material witnesses or to permit material witnesses in the Bureau of Internal Rev-

enue to testify unless Petitioner submitted the names of the particular persons in advance whose testimony he desired to take, and unless he also submitted full and complete interrogatories in each instance to be considered by the Commissioner for the purpose of determining whether permission would be granted the particular persons to testify and which of the interrogatories, if any, such persons would be permitted to answer, was a violation of due process of law (Rec. 785-788).

In *Ex parte Jackson*, 263 Fed. 110 (appeal dismissed in 267 Fed. 1022) it was held:

> "The refusal to produce one of the government's material witnesses for cross-examination in a deportation proceeding, unless the alien would disclose what he expected to prove, and deposit costs, denied due process of law, and rendered the proceedings unfair, though the government had another witness to the same matter."

The subject-matter of this controversy is Petitioner's 1920 income tax liability. The records Petitioner demanded pertained to that subject-matter, a part of which were his own private records which the unauthorized attorney had surreptitiously obtained and turned over to the attorneys for the Commissioner of Internal Revenue. No possible privilege could exist, unless public officers are privileged to "connive with rogues to rob the citizen of his property," which Judge COOLEY, in Constitutional Limitations, 6th Ed., p. 452, suggests should be prevented by permitting both parties to produce full proof.

Why has material evidence and records been suppressed and denied to Petitioner? If no fraud or conspiracy as charged by Petitioner existed, what reason can there be for refusing to permit witnesses to testify? If there is nothing to conceal, then what reason can there be for suppressing

the true facts? On the other hand, if there has been fraud and conspiracy, and the evidence in the record which was accessible to Petitioner and which he was permitted to introduce clearly establishes the fraud and conspiracy, is there still any reason why all the true facts should not be put in evidence? The same rule applicable to a private citizen is also applicable to public officers and officials, and in *Kaine* v. *Weigley,* 22 Pa. 179, 184, where the litigation was between private citizens, the court said:

> "* * * It is no hardship upon an honest man to require a reasonable explanation of every suspicious circumstance, and rogues are not entitled to a veto upon the means employed for their detection."

Respondent's refusal to produce witnesses and records and its suppression of testimony and documentary evidence was unnecessary if there had been no conspiracy, collusion and fraud.

If the pretended deficiency had not, in the first instance, been fraudulently determined in the amount of $54,852.90, then quickly reduced to $36,116.86, why did the Commissioner and Respondent, without Petitioner's knowledge, consent or permission, resort to substituting or permitting the substitution of attorneys unauthorized to represent Petitioner before the Board, and then resort to fraudulently stipulating with such second unauthorized attorney the falsely stated facts designed to sustain the deficiency and to destroy Petitioner's defense thereto?

If the deficiency had not been fraudulently determined in the first instance—and as a result of the conspiracy and frauds of attorneys for the Commissioner and Respondent and the second unauthorized attorney had not been fraudulently sustained by the Board—why was it necessary for the Commissioner's Assistant Chief Counsel, by forgery, to

change and alter the stipulation between such Chief Counsel and second unauthorized attorney providing that the Board's first decision sustaining the then asserted deficiency of $36,116.86 be vacated and set aside? (Ex. "A" hereto.)

If all the facts of Petitioner's defense had been truthfully stated in the fraudulent stipulation entered by the Commissioner's Chief Counsel and the second unauthorized attorney, and if those facts sustained the deficiency, why resort to the methods employed instead of permitting Petitioner to be heard thereon? That the stipulation fraudulently entered by the Commissioner's Chief Counsel and the second unauthorized attorney contained falsely stated facts is proven by the Board's action in the second pretended hearing in reducing the deficiency from $36,116.86 to $28,260.61 before resorting to its frauds of using the identical falsely stated facts, fraudulently stipulated in the first pretended hearing, as a basis for sustaining the $28,260.61 residue of such deficiency. That "hearing" was also a farce so far as granting Petitioner due process of law was concerned.

Even the Court of Appeals in its opinion in the instant case conceded "that such stipulation might have been incorrect * * *" but it avoided and dodged the effect of such statement by inferring that the Board's later decision was based upon revised stipulations and evidence, whereas the Record clearly reveals that by such revised stipulations and oral testimony Petitioner presented a full defense to the deficiency but the Board ignored that evidence and resorted to the identical fraudulently stipulated, falsely stated facts as one basis for its decision—in other words, the Board resorted to the identical stipulation the Court of Appeals conceded might have been incorrect.

If no fraud or conspiracy as charged by Petitioner existed, what reason could there be for Respondent suppressing documentary evidence? The Record demonstrates the frauds of attorneys for the Commissioner and Respondent and the unauthorized attorneys acting in cooperation, collusion or conspiracy. Why should the conspirators be protected, the Commissioner and Respondent be permitted to suppress oral testimony and records, some of which were Petitioner's own records and indispensable to his defense, and why should Petitioner be denied the right or opportunity to put all the true facts, including his indispensable records, in evidence?

Respondent's quest was for victory (money) not for the truth, and its refusal to produce witnesses and records gives rise to presumption such evidence would corroborate Petitioner's other proof and would sustain his allegations of conspiracy, collusion, fraud and denial of due process of law.

If Respondent was not trying to reap the benefits of conspiracy and frauds perpetrated upon Petitioner, then why did it not produce the government employees whose testimony Petitioner insisted would also have clearly established the fraud and conspiracy? The failure of a party to produce or account for the absence of his employees who could give important testimony, gives rise to the presumption that such employees' testimony would be unfavorable to his employer. This principle also applies to government employees.

In *United States* v. *Otley, et al.*, 34 F. Supp. 182, (aff'd in 127 F. (2d) 988) it was held:

"Where the United States in seeking to quiet title

to certain lands within a meander line failed to call as a witness the one by whom the meander line was run, the Court would assume that his testimony would have been contrary to the contention of the United States."

At page 188, the Court further observed:

"It seems fairly obvious that the quest was not for truth but for victory."

In the instant case it is equally obvious that Respondent's quest was not for truth but for victory.

In *Lowery* v. *United States,* 8 Cir., 128 F. (2d) 477, it was held:

"* * * unexplained failure of the government to place the federal officer on the stand, justified inference that his testimony, if presented, would have been unfavorable to the prosecution. 26 U. S. C. A., Int. Rev. Code. Sec. 2803, U. S. C. A., Const. Amends. 4, 5."

And in *Ex parte Oates,* 8 Alaska 319, in a *habeas corpus* proceeding in which the manner of selecting the jury which had convicted the petitioner was attacked, it was held that the failure of the government to summon and question the Commissioner or the United States Marshal amounted to a virtual admission by the government of the truth of the testimony received in favor of the petitioner as to the manner in which the jury was drawn and impaneled. That government and public officials are not the special favorites of courts has been held in *U. S.* v. *Lee,* 106 U. S. 196, 220, 27 L. ed. 171 at 182.

Under the facts proved by Petitioner and not denied or disproved by Respondent it was mandatory upon Trial Court to enjoin Respondent from enforcing the deficiency or reaping any benefit therefrom, and also mandatory upon

Court of Appeals to reverse Trial Court's judgment and to enjoin enforcement of the deficiency.

Since the decision and judgment in *Owens* v. *Commissioner,* 125 F. (2d) 210, was void because it was beyond the jurisdictional power of that court, and since said judgment and decision was merely the affirmance of the decision of the Board of Tax Appeals—which Board in making its decision denied Petitioner due process of law in that it did not permit Petitioner to make full proof of his defense and for the further reason that it refused to consider the evidence Petitioner did adduce but reached back and based its decision upon the identical falsely stated facts fraudulently stipulated in the first pretended hearing—it follows that it was mandatory that the Trial Court in the instant case should have enjoined Respondent from reaping any benefit from such void decision, *United States* v. *Throckmorton,* 98 U. S. 61, 65, 66, 25 L. ed. 93; *St. Louis* v. *Meek,* (Iowa) 2 G. Greene 55, 50 Am. Dec. 491, cited with approval in *United States* v. *Throckmorton, supra; Marine Ins. Co.* v. *Hodgson,* 7 Cranch (U. S.) 322, 3 L. ed. 362; *Barnett* v. *Kunkel,* 8 Cir. Okl., 259 Fed. 394, 400; *Simon* v. *Southern R. Co.,* 236 U. S. 115, 59 L. ed. 492.

In the case of *Luikart* v. *Farmers' Lumber Co.,* 10 Cir. Wyo., 38 F. (2d) 588, the Court said:

> "* * * Judge WALTER H. SANBORN states the philosophy of the rule in his characteristic, clear, language in *Horton* v. *Stegmyer,* (8 C. C. A.) 175 F. 756, 758, 20 Ann. Cas. 1134 (VANDEVANTER and MUNGER concurring), as follows:
>
> > 'A Federal court sitting in equity has jurisdiction to disregard or to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake, which deceive the court into a wrong decree, or which prevent the judgment de-

> fendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. * * * ' "

In the *Luikart* case, *supra*, the 10th Circuit Court of Appeals properly followed the decision by Judge WALTER H. SANBORN of the 8th Circuit, yet in the instant case it held exactly the opposite. A void judgment remains a void judgment although affirmed by an appellate court, Freeman on Judgments, 6th Ed., page 644, Sec. 322.

The Court of Appeals opinion in the instant case contains false statements of fact, and distorts and falsifies the record of the case.

The opinion of the Court of Appeals in the instant case avoids, evades and distorts the facts revealed by the Record. At page 797 of the Record the Court of Appeals in its opinion states:

> "The attorneys were concededly authorized to represent the taxpayer in the 1923 and 1926 cases, but the Board *reasoned* that since their authority to represent the taxpayer in the 1920 case was open to doubt, he should be given the benefit of it, and the case was accordingly restored to the calendar." (Emphasis mine.)

The Record demonstrates Petitioner at all times represented himself in the 1926 case; that there was no single fact in that case common or related to Petitioner's other cases pending before the Board, that by the connivance of Respondent's attorney and the second unauthorized attorney, who pretended to represent Petitioner, the 1926 case was fraudulently consolidated with this case and another; that the unauthorized attorney falsely stated to the Board that he represented Petitioner in three cases; that Respondent's attorney falsely stated to the Board that the facts

stated in the stipulation he was about to offer were the facts of Petitioner's 1926 case as well as his other cases; that after such procedure the unauthorized attorney abandoned all further pretense of resisting the deficiency asserted in Petitioner's 1926 case, abandoned that case along with the instant case, and that the Board also affirmed that deficiency as a result of the conspiracy, collusion and frauds of such unauthorized attorneys and attorneys for Respondent, and later vacated its decision in that case also (R. 365-386).

The opinion of the Court of Appeals (R. 798) also states:

> "In his answer, the taxpayer admitted the allegations of the complaint, but alleged that the 1920 deficiency was a direct result of and arose out of frauds extraneous to the record perpetrated pursuant to a prolonged and continuous series of conspiracies to blackmail and extract money from him by malicious prosecution, and that he was thereby denied an opportunity to be heard in defense against the alleged and pretended deficiency."

Such statement is copied almost verbatim from page 6 of Respondent's brief filed in this case with the Court of Appeals. There Respondent made the following statement:

> "In his answer, the taxpayer admitted the allegations of the complaint, but alleged that the instant cause and proceeding was a direct result of and arose out of frauds extraneous to the record therein perpetrated pursuant to a prolonged and continuous series of conspiracies to blackmail and extract $100,000 from him by malicious indictment and malicious prosecution.***"

Not only is the statement, "In his answer, the taxpayer admitted the allegations of the complaint" maliciously false and not supported by the Record but such statement is absolutely contradicted by the Record. Nevertheless, it was

repeated on page 7 of Respondent's aforesaid brief and thereafter adopted by the Court of Appeals.

Correctly anticipating the type and character of opinion the Court of Appeals would render, as well as which of the judges would deliver it, Petitioner, on pages 24 and 25 of his Reply Brief filed with that Court, with meticulous care, called that Court's attention to such maliciously false statement and falsification of the Record.

In an effort to get his evidence considered, to get a judicial determination of his case on that evidence, to prevent another denial of due process of law and another gross miscarriage of justice, Petitioner, under a heading in his Reply Brief in black face type reading, "Appellee's Distortions and Falsification of the Record and of the Facts," devoted 25 additional pages of his Reply Brief to exposing innumerable other false statements of fact and distortions and falsifications of the Record in Respondent's brief filed in that Court; and thereafter Petitioner filed with that Court his Motion to Disqualify (R. 795) the three judges who rendered the Court's opinion in the instant case in a further effort to prevent their sitting in judgment of their prior acts, decision and judgment in *Owens* v. *Commissioner* (125 F. (2d) 210). The judges denied the motion on the ground "that it is without substance" (R. 796) but by their opinion (R. 796-799) demonstrated the motion was all substance, was well grounded and should have been granted.

Such opinion (R. 796-799) and the same court's and judges' opinion in *Owens* v. *Commissioner* (125 F. (2d) 210) might as well have been written by the Member of the Board of Tax Appeals—who conducted the second pretended hearing of Petitioner's defense to the fraudulent deficiency, ignored Petitioner's evidence and in writing the Board's Opinion affirming the deficiency reached back and

used the identical falsely stated facts fraudulently stipulated—and the second unauthorized attorney and the Commissioner's Assistant Chief Counsel who fraudulently stipulated those falsely stated facts, the latter of whom later committed the forgery to retain the benefits of his and the unauthorized attorneys' frauds.

There can be no excuse or justification for the above quoted maliciously false statement in the Court's opinion. If such statement were true it should have been unnecessary for the Court's opinion to state more than that Petitioner thus confessed judgment; that although Petitioner offered voluminous oral and documentary evidence to support his attack upon the deficiency, his having admitted the allegations of the complaint left no controversy for either the Trial Court or the Court of Appeals to decide.

If such statement were true the Trial Court should have so found in its findings of fact, and thereafter the Court of Appeals should have dismissed the case and under its Rules should have fined Petitioner for prosecuting a frivolous appeal for delay only.

Nevertheless, in its opinion in the instant case (R. 798) the Appellate Court further stated:

> "The gravamen of taxpayer's defense in the trial of the case was the alleged fraudulent conspiracy between the unauthorized counsel *who represented him* in the 1920 proceedings before the Board and an assistant to the Chief Counsel of the Bureau of Internal Revenue." (Emphasis mine.)

How could an unauthorized attorney represent Petitioner or anyone else?

> *Continuing,* "He specifically referred to certain stipulations entered into between them by which, he contended, they wrongfully prevented him from presenting a proper defense in the 1920 proceedings before

the Board. Correspondence exchanged between the *so-called* unauthorized counsel and the taxpayer was introduced in evidence relating to the apparent misunderstanding as to their attorney and client relationship." (Emphasis mine.)

The Record also demonstrates that the second unauthorized attorney, by letters attempting to explain and justify such unauthorized conduct, insisted, "I was not retained in these cases and Mr. Owens knows it. I have no authority to act for him in these cases * * *" (R. 779).

Why the characterization "so-called unauthorized counsel" when the Record reveals that both Petitioner and such attorney insisted he was wholly unauthorized to represent Petitioner? Under that state of facts clearly revealed by the Record, why characterize the unauthorized attorneys' proven and admitted lack of authority as "the apparent misunderstanding as to their attorney and client relationship"? Can there be an attorney and client relationship with an unauthorized attorney?

Continuing, "But nothing in the correspondence referred to any agreement or plan between the attorney and any agent of the Government."

As if such unauthorized attorney, guilty of the conspiracies and frauds demonstrated by the Record, would confess, in writing, to Petitioner he had conspired with an attorney or agent of the government to perpetrate frauds upon Petitioner.

Furthermore, the last quoted excerpt from the opinion is a distortion of the Record in that the Record (R. 355-375) clearly discloses, in proper sequence and step by step, the sucessive moves and acts of the conspirators beginning with the fraudulent unauthorized appearance of the first unauthorized attorney, the methods employed for the sub-

stitution of the second for the first unauthorized attorney and for Petitioner's attorney of record before the Board, the acts of such second unauthorized attorney in cooperation or conspiracy with the Commissioner's Assistant Chief Counsel in fraudulently stipulating the falsely stated facts, such fraudulent stipulation and the false statements of fact included therein, the material and decisive facts omitted therefrom, the false statements of such unauthorized attorney to the Board that he represented Petitioner, the false statements of the Assistant Chief Counsel that the stipulation contained all the facts of Petitioner's defense;

And the Record at pages 355-375 reveals undenied proof that such stipulation had been prepared by attorneys for the Commissioner; that the unauthorized attorney knew the purpose but did not know the substance and contents thereof at the time it was offered, that he proceeded thereafter to introduce documentary records which repudiated certain of such false statements of fact, that the attorney for the Commissioner objected to the introduction of such records, that they were received in evidence by the Board upon the Board's statement that such documentary records would not be included in the official record of the case, which, of course, meant that they would not be considered by the Board and could not be considered on review by the Court of Appeals, and also the subsequent abandonment by such unauthorized attorney of all further pretense of making Petitioner's defense, his defaulting Petitioner and the decision of the Board affirming the fraudulent deficiency as a result thereof (R. 386).

When considered with the true facts, revealed by the Record, proved by Petitioner and not denied or attempted to be refuted or disproved by Respondent the opinion of the Court of Appeals in the instant case clearly shows Petitioner has been denied due process of law.

The opinion of the Court of Appeals in this case, in effect, holds that conspiracy, collusion and fraud can only be proven and established by a written confession of one or more of the conspirators. (See *Castle* v. *Bullard,* 23 How. 172, 16 L. ed. 424, at 428; *St. Francis Mill Co.* v. *Sugg,* (Mo.) 104 S. W. 45, at 47.)

Such conception and statement does greater violence to the law, and to equity and justice, than that of the trial judge in his findings of fact (R. 129) made during the course of the trial and without examining, considering or knowing the contents of the great bulk of records and documentary evidence immediately theretofore offered, to-wit:

> "Now, then, with reference to the question of conspiracy: I realize that the defendant in this case is carried away by that but I can't find any evidence in this case to convince me that any one department or more than one department, either the Treasury of the Attorney General's Office or of the Commissioner of Internal Revenue, that evidence establishes a *direct and wilful* conspiracy to deprive the Petitioner, the defendant of his rights, and so find in addition to the other facts." (Emphasis mine.)

All conspiracies are willful, most are indirect, otherwise they could not succeed. Direct testimony of a conspiracy is rarely obtainable but in the instant case is established by documentary evidence which the Respondent made no effort to deny or to refute and which both the Trial Court and the Court of Appeals ignored.

The facts of the instant case prove clearly there was

conspiracy and fraud. Other proof, had it not been suppressed by Respondent, would also have clearly established such conspiracy and fraud. Respondent may not take the benefit of such fraudulent acts without assuming also the burdens that attach. As long ago as 1757 in *Bridgeman* v. *Green,* 2 Vesey 627 (Wilmott 58), 97 Eng. Reprint 22, it was held that whoever receives as a result of the fraud of another must take that which he receives tainted and infected by the fraud,

> "Let the hand receiving be ever so chaste yet if it comes through a corrupt channel the obligation of restitution will follow it. * * *"

Yet the Court of Appeals in the instant case took the view that since the unauthorized attorney did not in writing specifically say, "I entered into an agreement or plan with an agent of the government to defraud you" and then describe in detail how the fraud was perpetrated, that there was no evidence to support a charge of conspiracy between and frauds by the second unauthorized attorney and Counsel for the government. (See *Castle* v. *Bullard, St. Francis Mill Co.* v. *Suggs, supra.*)

It can be said, to his credit or discredit, that the Board Member who prepared the Board of Tax Appeals' Opinion affirming the $28,260.61 residue of the fraudulent deficiency at least attempted to fit the facts to his predetermined decision, but in so doing made a pitiful or worse spectacle of himself, as disclosed by the Record (R. 610-667). The Court of Appeals, like the Trial Court—which did not know the substance or contents of the great bulk of documentary evidence offered by Petitioner and not denied or even attempted to be refuted by Respondent—ignored and brushed aside such undisputed evidence, held there was no evidence to sustain the allegations, and further ignored the fact that

if such evidence was, in both courts' judgment, insufficient to sustain the allegations of conspiracy and fraud, nevertheless the documentary and oral evidence demanded by Petitioner and suppressed by Respondent might, perhaps, sustain such allegations.

Also, in its opinion in the instant case (Rec. 798) the Court of Appeals stated:

> "Since the taxpayer appeared *pro se,* the trial court was infinitely patient in permitting him to introduce voluminous records and evidence, substantially all of which involved facts relating to the merits of the deficiency determination by the Commissioner for the taxable year 1920."

The matter in controversy was Petitioner's alleged liability under the fraudulent deficiency. Making his defense required proving all the facts upon which such fraudulent deficiency purported to rest and the methods by which such deficiency had been fraudulently determined. Petitioner had the constitutional right, not mere permission limited by the Trial Court's patience, to offer all his evidence but he was denied that right by Respondent who refused to produce records, including Petitioner's own records indispensable to his defense, and who refused to produce witnesses under Respondent's control notwithstanding Petitioner's demands and the Trial Court's orders.

Petitioner also had the constitutional right to have *ALL* his evidence when offered considered by the Board of Tax Appeals, by the Trial Court and by the Court of Appeals, and to have judicial findings and a judicial determination based upon all such evidence. In all instances he was denied that right.

The Court of Appeals opinion is silent about the Trial Court making its findings of fact upon the issue of conspir-

acy and fraud during the course of the trial and without examining, considering or knowing the contents of the great bulk of documentary evidence which conclusively established and demonstrated such conspiracy and fraud.

In its Opinion (R. 798) the Court of Appeals further stated:

> "The taxpayer also testified that as part of the conspiracy, the Commissioner misrepresented facts to the Board of Tax Appeals and fraudulently withheld certain information until just before the case was argued, thus preventing taxpayer from preparing a proper defense."

Such statement is a distortion of the facts and of the Record, which reveals, in addition to the proof of the fraudulently stipulated falsely stated facts, the further fact that on review by the Court of Appeals Respondent presented an issue not considered or decided by the Board (*Owens* v. *Commissioner,* 125 F. (2d) 210) but which the Board expressly excluded from its consideration and refused to find the facts thereof (R. 623); that Respondent withheld service of its brief in the Appellate Court upon Petitioner or his duly authorized attorney until just before the argument to the Court so that Petitioner was prevented from meeting that issue.

The Record also discloses that the Court of Appeals with the identical judges sitting, in rendering the opinion in *Owens* v. *Commissioner, supra,* seized upon such newly raised issue, made its own independent findings of fact thereof, avoided deciding the question of law arising out of such facts so found and arbitrarily and capriciously sustained the decision of the Board affirming the $28,260.61 residue of the fraudulent deficiency.

In its opinion in the instant case the Court of Appeals also stated (R. 799):

> "It is true that in proper proceedings, equity will set aside a judgment obtained by fraud, regardless of its term of entry. However, because of reluctance to alter final judgments, *such equitable power should be exercised only when the fraud is manifestly unconscionable. Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238." (Emphasis mine.)

Such statement is a strained interpretation of the cited case which holds that where the fraud is manifestly unconscionable courts of equity will give relief without hesitation. A more manifestly unconscionable fraud could not be imagined than the one proved and demonstrated in this case. It is made more unconscionable by the fact that attorneys for the Commissioner of Internal Revenue and Respondent, in the guise of trying to collect taxes, by conspiracy and fraud procured a fraudulent decision of the Board of Tax Appeals sustaining the residue of a deficiency previously fraudulently determined, the purpose of which was to tax as income to Petitioner money extorted from him by another government official acting in that matter for Respondent herein.

The Court of Appeals in its Opinion in the instant case (R. 799) states:

> "There is no evidence in the record here that the *Commissioner* fraudulently prolonged the prior litigation, or participated in any conspiracy to deprive the taxpayer of properly presenting his defense to the 1920 tax deficiency assessment. We so held in *O. O. Owens* v. *Commissioner, supra,* and it is binding upon the taxpayer for that purpose as well as on the merits of the deficiency assessment." (Emphasis mine.)

Evidently the Court makes a distinction between the Com-

missioner and his agents, servants and attorneys. Evidently the Court holds that the latter can perpetrate all the frauds demonstrated to have been committed by them but that since the Commissioner was not a participant in person in the conspiracy and the frauds there is no evidence that he prolonged the prior litigation or participated in any conspiracy to deprive Petitioner of properly presenting his defense.

Such statement is an anomaly in the light of the fact that the Board itself vacated and set aside its first decision —eight years, four months and two days after the fraudulent and unauthorized appearance of the first unauthorized attorney—because Petitioner had been denied a hearing or opportunity to be heard in his defense during such eight years and four months as a result thereof and because of the subsequent acts of the second unauthorized attorney and their effect of denying Petitioner a hearing or opportunity to be heard.

In its Opinion in *Owens* v. *Commissioner,* 125 F. (2d) 210, at 213, the same Court of Appeals, with the identical judges participating, held that the Commissioner was in no way responsible for "the unauthorized attorney's assumption of authority to act" and that therefore the Commissioner was not responsible for the eight years and four months delay in deciding the case caused by the unauthorized attorney's intercession. There, "the assumption of authority to act" by the unauthorized attorney was not the issue. The issue was the unauthorized attorney's ACTS at all times known by Respondent to be unauthorized, and with such knowledge Respondent could not collect interest on any deficiency, however small, for such delay in deciding the case resulting from those ACTS.

In that case there was no issue of conspiracy or fraud before the Court of Appeals—because Petitioner had sought but had been denied leave to reopen the case before the Board and offer newly discovered evidence establishing such fraud (R. 623).

In its opinion in the instant case (R. 799) the Court of Appeals further stated:

> "Taxpayer's allegation of fraud on the part of the Board and the Government agent has its genesis in the stipulation entered into between the so-called unauthorized counsel and the Government. Conceding that such stipulation might have been incorrect, it is of no moment here since the Board specifically found that it was unauthorized in its order vacating its prior opinion, and restored the case to the calendar for another hearing in due course. The subsequent decision of the Board re-determining the deficiency was rendered after a full hearing, at which revised stipulations and evidence were adduced by the taxpayer and the Commissioner. All questions presented here have been formerly presented and decided adversely to the taxpayer, and they must stand."

Thus the Court concedes that the fraudulent stipulation of falsely stated facts "might have been incorrect" but concludes, "* * * it is of no moment here * * *" since the Board specifically found that it was unauthorized and vacated its decision. But, the Court ignores the fact that in the later hearing which it denominated "a full hearing" Petitioner was denied the opportunity and right to present all his evidence, his own records then and since in the custody of the Commissioner or his attorneys, and that after Petitioner's other evidence had been offered the Board gave it no consideration but resorted to the identical fraudulent stipulation containing the falsely stated facts, which the Appellate

Court said "might have been incorrect," as a basis for its (the Board's) decision which the same Court later, in *Owens* v. *Commissioner*, 125 F. (2d) 210, affirmed.

Surely this Court of last resort will not ignore or condone the conspiracies nor permit the frauds upon Petitioner, proved and established by the Record of this case, to go unredressed and by so doing force Petitioner, as a last resort, to pursue the remedy of seeking relief from the Congress as was done by Messrs. Beene & Waller and their wives (R. 672-678), lithographic copies of which exhibits are hereto attached as Exhibit "B."

Should this Court deny this Petition for Writ of Certiorari this case will become a precedent for and will obviously be construed by the Commissioner of Internal Revenue and Respondent and their agents, attorneys and other representatives as license to loot and plunder by repeating the same or committing other frauds upon not only the wary taxpayers, who are able and willing to resist such conspiracies and frauds, but also upon the unwary taxpayers who are unwilling or feel unable to defend themselves. For the latter class Amendment V will be hollow mockery and a delusion and there will remain no hope for due process of law as guaranteed thereby. Neither will there remain any hope that their property will not be confiscated by corrupt public officials and bureaucrats other than to rely upon the generosity of a corrupt, despotic government.

Respectfully submitted,

O. O. Owens,
Petitioner.

EXHIBIT "A"

U. S. Board of Tax Appeals
Filed June 5, 1933

UNITED STATES BOARD OF TAX APPEALS

O. O. OWENS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 14979

STIPULATION

It is hereby stipulated and agreed between the Petitioner and the Respondent herein, by their respective counsel, that the decision and final order of redetermination heretofore entered herein on October 11, 1932, may and shall be vacated and set aside, and the above entitled case continued for settlement under Rule 50 and allowed to pend until the appeal of the Respondent to the United States Circuit Court of Appeals in the case of O. O. Owens, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 21987, shall have been finally determined by the Courts.

It is further hereby stipulated and agreed that if, upon the final determination of the above mentioned appeal, the decision and final order of determination entered by the Board of Tax Appeals in the case so appealed shall be affirmed by the Courts, the decision and final order of determination heretofore entered in the above en-

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titled case shall be re-entered in the above entitled case by the Board of Tax Appeals upon motion of either party.

It is further hereby stipulated and agreed that if, upon the final determination of the above mentioned appeal, the decision and final order of determination entered by the Board of Tax Appeals in the case so appealed shall be reversed, in whole or in part, by the Courts, a decision and final order of determination shall be entered in the above entitled case by the Board of Tax Appeals upon motion of either party, in accordance with the findings of fact and the legal principles adopted by the Courts in finally disposing of the above mentioned appeal in so far as the same may be found to be applicable by the Board of Tax Appeals to the above entitled case.

It is further hereby stipulated and agreed that if the Respondent does not take the above mentioned appeal, then promptly after the expiration of the time within which the Respondent may take such appeal, the decision and final order of determination heretofore entered in the above entitled case shall be re-entered in the above entitled case by the Board of Tax Appeals upon motion of either part

Counsel for Petitioner

Dated at Washington, D.C.
January 5, A. D. 1938.

Counsel for Respondent.

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UNITED STATES BOARD OF TAX APPEALS

O. C. OWENS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Dockets Nos. 14379 and 47[illegible].

ORDER VACATING DECISION AND CONTINUING FOR SETTLEMENT UNDER RULE 50.

In these proceedings, on January 5, 1933, stipulations have been filed by counsel for petitioner and counsel for respondent, as follows:

It is hereby stipulated and agreed between the petitioner and the respondent herein, by their respective counsel, that the decision and final order of redetermination heretofore entered herein on October 11, 1932, may and shall be vacated and set aside, and the above entitled case continued for settlement under Rule 50 and allowed to pend until the appeal of the respondent to the United States Circuit Court of Appeals in the case of O. C. Owens, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 71986, shall have been finally determined by the Courts.

It is further hereby stipulated and agreed that if, upon the final determination of the above mentioned appeal, the decision and final order of determination entered by the Board of Tax Appeals in the case so appealed shall be affirmed by the Courts, the decision and final order of determination heretofore entered in the above entitled case shall be re-entered in the above entitled case by the Board of Tax Appeals upon motion of either party.

It is further hereby stipulated and agreed that if, upon the final determination of the above mentioned appeal, the decision and final order of determination entered by the Board of Tax Appeals in the case so appealed shall be reversed, in whole or in part, by the Courts, a decision and final order of determination shall be entered in the above entitled case by the Board of Tax Appeals upon motion of either party, in accordance with the findings of fact and the legal principles

adopted by the Courts in finally disposing of the above mentioned appeal in so far as the same may be found to be applicable by the Board of Tax Appeals to the above entitled case.

It is further hereby stipulated and agreed that if the respondent does not take the above mentioned appeal, then promptly after the expiration of the time within which the respondent may take such appeal, the decision and final order of determination heretofore entered in the above entitled case shall be re-entered in the above entitled case by the Board of Tax Appeals upon motion of either party.

In view of the above-quoted stipulation, the decisions entered in these proceedings on October 11, 1932, are hereby vacated and set aside and the proceedings are continued for settlement under Rule 50 until the appeal of the respondent to the United States Circuit Court of Appeals in the case of O. O. Owens, petitioner, v. Commissioner of Internal Revenue, respondent, Docket No. 31986, shall have been finally determined by the courts.

Eugene Black

Member,
U. S. Board of Tax Appeals.

Enter.

[redacted]

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73d CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 731

SHELBY J. BEENE ET AL

FEBRUARY 14, 1934.—Committed to the Committee of the Whole House and ordered to be printed

Mr. SWANK, from the Committee on Claims, submitted the following

REPORT

[To accompany H.R. 5736]

The Committee on Claims, to whom was referred the bill (H.R. 5736) for the relief of Shelby J. Beene, Mrs. Shelby J. Beene, Leroy T. Waller, and Mrs. Leroy T. Waller, having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment: At end of bill, add:

: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold, or receive any sum of the amount appropriated in this Act in excess of 10 per centum thereof on account of services rendered in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

The above-named persons seek refunds for overpayment of income taxes for the years 1921 and 1922.

The report of the Treasury Department to the Committee on Claims is found to be such an accurate and comprehensive statement of the facts involved that it is reproduced in full as follows:

TREASURY DEPARTMENT,
Washington, D.C., January 23, 1934.

Hon. LORING M. BLACK,
Chairman Committee on Claims, House of Representatives.

DEAR MR. CHAIRMAN: Further reference is made to your letter of May 22 1933, transmitting to the Treasury Department for report a copy of H.R. 5736 (73d Cong., 1st sess.), a bill for the relief of Shelby J. Beene, Mrs. Shelby J. Beene, Leroy T. Waller, and Mrs. Leroy T. Waller, residents of Haynesville, La.

The bill would authorize and direct the Secretary of the Treasury to pay to Shelby J. Beene the sum of $14,739.58, to Mrs. Shelby J. Beene the sum of $15,-227.80, and Leroy T. Waller and Mrs. Leroy T. Waller each the sum of $14,531.79, together with interest at the rate of 6 percent per annum from December 28, 1929, these amounts representing payments of income tax and interest for the years 1921 and 1922. December 28, 1929, is the date the payments were made.

The 4 individuals mentioned above, together with 44 others, were members of a partnership designated J. E. Smitherman Special Account, which leased and developed an area situated in Louisiana known as the "Haynesville Oil Field." In 1921 and 1922 the partnership executed subleases to certain oil companies, receiving therefor cash bonuses or advance royalties, with additional amounts to be paid out of the oil when produced. These amounts were included as income on the income-tax returns of the partnership for the years 1921 and 1922, and against these receipts was charged depletion based on discovery value, together with other expenses of the partnership. The net income remaining was shown as distributable to the individual members of the partnership, each partner's distributive share of the profits, therefore, reflecting a portion of the depletion which had been claimed as a deduction on the returns of the partnership.

The Bureau of Internal Revenue contended that the partnership had disposed of its leases and was not entitled to a deduction for depletion on discovery value and proceeded to assess an additional tax against each member of the partnership. The four individuals here under consideration appealed to the United States Board of Tax Appeals and the Board upheld the Bureau (16 B.T.A. 574). These taxpayers then filed a petition for review of the Board's decision with the United States Circuit Court of Appeals for the Fifth Circuit. The court affirmed the decision of the Board of Tax Appeals (40 Fed. (2d) 892), and a petition for writ of certiorari, filed in the Supreme Court of the United States, was denied on December 1, 1930. The income-tax liability determined in accordance with the decision was paid by these taxpayers on December 28, 1929, as aforesaid, under protest.

The other 44 members of the partnership paid the deficiency assessments under protest and brought suit for the recovery of the tax in the United States District Court for the Western District of Louisiana, the 44 cases being consolidated for the purpose of trial under the caption *Palmer* v. *Bender* (49 Fed. (2d) 316). The issue in these cases as to income from the Smitherman partnership was the same as in the case of the four other individuals mentioned and the facts were identical. The district court indicated the view that depletion deductions were allowable, but held himself bound by the decisions of the court of appeals contrary to the views expressed by him, and rendered judgment against the taxpayers. The circuit court of appeals affirmed the judgment (57 Fed. (2d) 32).

The case was then taken to the Supreme Court on writ of certiorari and that court held the depletion deductions allowable (287 U.S. 551). As the result of this decision, refunds are being made to the 44 partners who joined in this action, but the four partners mentioned in H.R. 5736 were not included and have no recourse other than through the approval of this bill. The passage of this bill would place these four individuals on a parity with the 44 who are receiving refunds through the decision of the United States Supreme Court.

Under the existing circumstances, the Department will interpose no objection to the enactment of the bill.

Very truly yours,

HENRY MORGENTHAU, Jr.,
Secretary of the Treasury.

Pursuant to the decision so rendered by the Supreme Court of the United States in *Palmer* v. *Bender*, counsel for the petitioners and counsel for respondent therein signed stipulations applying the ruling of the court to the facts and figures involved in the litigation. These stipulations, with tables I and II, were the figures and computations upon which the judgments for refunds in favor of each partner were based. Table I showed net income of the partnership as revised by the court's decision, for the years 1921 and 1922. Table II showed the distribution of the taxable income to each of the partners for 1921 and 1922 after the income had been so revised. The shares of Waller and Beene were shown as nonparticipants in the *Palmer* v. *Bender* suit on these tables, but the amounts which they were entitled to were thus determined and fixed just as were the amounts refundable to the 44 partners who were parties to the suit. The application of these revised figures to the income-tax returns of Waller and his wife and Beene and his wife for the years 1921 and 1922, fixes the amounts of the overpayments, refunds of which are provided for in this bill

These stipulations and tables are on file in the Treasury Department. Copies thereof have been furnished to this committee.

The status of the 4 partners is identical with that of the 44 partners who were granted refunds pursuant to the decree in *Palmer* v. *Bender*. The *Palmer* v. *Bender* suit was tried on the transcript of evidence, stipulations, and facts constituting the evidence in the Waller and Beene cases. The questions involved for decision by the courts were identical. The same circuit court of appeals made the same error in each set of cases. The circuit court of appeals in rendering its opinion in the *Palmer* v. *Bender* suit said:

> The questions presented have heretofore been considered upon an identical state of facts and decided by this court upon petitions of other members of the Smitherman and Baird partnerships to review decisions of the Board of Tax Appeals in the cases of *Waller* v. *Commissioner* (40 Fed. (2d) 892); and *Herold* v. *Commissioner* (42 Fed. (2d) 942).

(The Herold case related to the Baird partnership.)

The Supreme Court failed to review the decision of the lower court in the cases involving the 4 partners who are claimants in this bill, but subsequently reviewed and corrected the decision involving the 44 partners. The four partners were unable to pay when the deficiency assessments were made in 1926, and to proceed as did the other partners on account of financial reverses. They had paid the income taxes thought to be due on 1921 and 1922 incomes 4 years before and did not anticipate the large deficiency assessments. There seemed to be great confusion with reference to oil and gas depletion. Waller was a country doctor and Beene a country merchant and farmer. They seem to have been able to pay the deficiency assessments after the Board of Tax Appeals confirmed the assessments in 1929 only by sacrificing their properties. They have made every possible effort and availed themselves of every possible remedy to secure proper refunds in the courts. It seems equitable and just that the money paid into the Treasury in error by these four claimants, should be refunded to them.

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[PRIVATE—No. 303—73D CONGRESS]

[H.R. 5736]

AN ACT

For the relief of Shelby J. Beene, Mrs. Shelby J. Beene, Leroy T. Waller, and Mrs. Leroy T Waller.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Shelby J. Beene the sum of $14,739.58, to Mrs. Shelby J. Beene the sum of $15,227.80, and to Leroy T. Waller and Mrs. Leroy T. Waller each the sum of $14,531.79, together with interest at the rate of 6 per centum per annum thereon in each case from December 28, 1929, to the date of making payment under this Act. Such sums represent overpayments of income taxes made (under protest) on such date by the said persons for the years 1921 and 1922. The said persons were four of forty-eight partners composing a partnership each member of which was assessed with deficiency assessments for 1921 and 1922. Depletion on account of certain bonuses and advanced royalties received by the partnership was not allowed and each partner's taxable income was correspondingly increased. Forty-four of the partners paid under protest and entered suits for refunds. The other four partners named in this Act appealed from the deficiency assessment, but the Board of Tax Appeals and Circuit Court of Appeals, Fifth Circuit maintained the validity of the assessments as to them, and the United States Supreme Court refused to grant them writs of certiorari. Subsequently the United States Supreme Court in the case of Palmer against Bender (287 U.S. 551) (being the consolidated suits of the forty-four remaining partners before the Supreme Court on writs of certiorari to the Circuit Court of Appeals, Fifth Circuit) held that the depletion claimed by the partnership should have been allowed, and the forty-four partners were allowed refunds accordingly. The four partners' claims for refunds involved the same facts and law as those of the forty-four partners: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold, or receive any sum of the amount appropriated in this Act in excess of 10 per centum thereof on account of services rendered in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

Approved, June 19, 1934.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term 1949.

No. 508

O. O. OWENS, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

REPLY TO BRIEF IN OPPOSITION.

The falsifications of the facts and the distortions of the Record in Respondent's Brief in Opposition requires the filing of this Reply Brief which your Petitioner prays this Court will receive and consider.

On page 2 of Brief in Opposition, under the heading, "Question Presented," appears the following:

> "* * * This in turn depends upon whether the Court of Appeals exceeded its jurisdiction, and whether the District Court, in the present proceeding, erred in finding that the evidence did not support taxpayer's claim of conspiracy (allegedly involving the Commissioner of Internal Revenue and others) to deprive him of his day in court."

That the Court of Appeals did exceed its jurisdiction is made abundantly clear by the short argument of that proposition on pages 24 and 25 of Petitioner's Brief in support of his Petition filed herein.

It will be observed the trial court made no findings of the facts of the FRAUDS (R. 28-29), although the frauds

were not denied by Respondent but were abundantly proved and established by Petitioner's documentary evidence—notwithstanding Respondent suppressed other documentary evidence and oral testimony which would have also proved and established both conspiracy and the frauds perpetrated pursuant thereto.

The Record, at page 129, reveals that during the course of the trial and without knowing or considering the contents of the great bulk of documentary evidence immediately theretofore introduced by Petitioner, and which evidence conclusively established the frauds as well as the conspiracy, the Trial Court stated:

> "Now then, with reference to the question of conspiracy: I realize that the defendant in this case is carried away by that but I can't find any evidence in this case to convince me that any one department or more than one department, either the Treasury of the Attorney General's Office or of the Commissioner of Internal Revenue, that evidence establishes *a direct and wilful* conspiracy to deprive the Petitioner, the defendant of his rights, and so find in addition to the other facts."

All conspiracies are willful; most are indirect.

It is obvious the Trial Court's Finding of Fact IV (R. 29):

> "That the defense offered by the defendant relative to a conspiracy to deprive him of his day in court and the further defenses offered by the defendant were included in the former case of *Owens* v. *Commissioner*, 125 F. (2d) 210. That the evidence is not sufficient to support the claim as to any conspiracy nor that the defendant was denied his day in court."

is merely reiteration of the previous finding (R. 129) but omitting the peculiar characterization "direct and wilful

conspiracy." It is equally obvious the Trial Court intentionally used the expression "direct and wilful conspiracy" to distinguish the conspiracy proved by Petitioner, and not denied or attempted to be refuted by Respondent, from an intentionally designed and effectuated conspiracy.

Moreover, the Finding (R. 29):

> "That the defense offered by the defendant relative to a conspiracy to deprive him of his day in court and the further defenses offered by the defendant were included in the former case of *Owens* v. *Commissioner*, 125 F. (2d) 210."

was obviously made in complete disregard of the Record facts.

The Record (395-665) clearly demonstrates that there was no issue of conspiracy, or of collusion and frauds, in *Owens* v. *Commissioner* reported in 125 F. (2d) 210, and that opinion on its face so shows. There the issues were limited to Petitioner's liability for tax on $75,989.20 extorted from him in 1920 by the Secretary of Interior, and whether Petitioner could be held liable for interest on any deficiency, however small, for the eight years, four months and two days' delay in the decision of the case caused by the unauthorized intercession of unauthorized attorneys pretending to repesent Petitioner, whose lack of authority was at all times known by the Commissioner of Internal Revenue, his attorneys and other representatives.

The Record also reveals (R. 357-359, 585-609) that, after the Board of Tax Appeals in November, 1939, had heard the evidence only and before all the briefs were filed, Petitioner, on March 26, 1940, discovered convincing proof that the unauthorized appearances and acts of the unauthorized attorneys pretending to represent your Petitioner—the second of whom had stipulated away your Petitioner's defense

to the asserted deficiency—and the acts of the attorneys for the Commissioner of Internal Revenue, in cooperation with such unauthorized attorneys, resulted and flowed from a perfectly designed and well concealed conspiracy between such unauthorized attorneys and attorneys for the Commissioner of Internal Revenue, and also resulted and flowed from a conspiracy between attorneys for the Commissioner, to deprive and to defraud your Petitioner of a hearing or opportunity to be heard and also to enable the Board of Tax Appeals to decide the case upon part only of the facts of your Petitioner's defense—such part to be falsely stated and fraudulently stipulated;

That upon discovery of such proof your Petitioner immediately sought to reopen the case (R. 357-359, 585-609) and to offer full proof of such conspiracy, but the Board denied him leave so to do (R. 623), and based and grounded its decision, in part, upon the identical falsely stated facts previously fraudulently stipulated (R. 621-622); that thereafter when that fact had been called to the Board's attention (R. 623-667) the Board made important changes in its Findings of Fact, without changing its Conclusions of Law which conformed to the falsely stated facts set forth in an opinion of the Court of Appeals in another case (R. 621-623), which latter opinion was also based upon the aforesaid falsely stated facts fraudulently stipulated, and which omitted any reference whatever to the deduction, or the facts thereof, in controversy in Petitioner's 1920 case.

On pages 2 and 3 of Respondent's Brief the following statement appears:

> "On February 13, 1926, the Commissioner determined a deficiency in the taxpayer's income tax liability for the taxable year 1920, and on that date sent him, by registered mail, a written notice of such determination. Within sixty days thereafter, a petition was

filed by the taxpayer with the Board of Tax Appeals seeking a redetermination of such deficiency. On February 13, 1941, the Board redetermined such deficiency in the sum of $28,260.61."

Had the Trial Court found and had Respondent stated: EXACTLY FIFTEEN YEARS LATER the Board redetermined the deficiency in the sum of $28,260.61, such amount being the tax determined to be due on $75,989.20 of the taxpayer's income which he claimed the Secretary extorted from him in 1920—such statement would shock, would amaze and would dumbfound this Court. Nevertheless such statement is correct and is the substance of the immediately above quoted excerpt from Respondent's Brief.

With no deaths requiring revivor of the action, with no third parties' rights intervening to complicate or delay redetermination by the Board, in the amount of $28,260.61, of a deficiency originally determined in the amount of $54,852.90 and thereafter reduced to $36,116.86 by the Commissioner, any court should be dumb-founded by such delay, and should also be disturbed by the question: What caused such prolonged delay?

The Answer: Conspiracies and frauds, including forgery committed by an Assistant Chief Counsel for the Commissioner, to deprive and defraud Petitioner of a hearing or opportunity to be heard in defense against such deficiency which had been fraudulently determined in the first instance; the fraudulent substitution of unauthorized attorneys for Petitioner's attorney of record before the Board; the fraudulent stipulating by the second unauthorized attorney and an attorney for the Commissioner of falsely stated facts as the facts of Petitioner's defense; the omission of any reference to any fact relating to the payment in 1920 by Petitioner of $75,989.20 extorted from him by the Secretary; the conspirators' conniving—for eight years and four months after the first unauthorized attorney fraudulently

entered his "appearance" as Petitioner's attorney before the Board—to retain the benefits of their frauds, including forgery, and their seeking to enforce the Board's affirmance, also obtained by fraud, of the deficiency in the amount of $36,116.86; their prolonged, bitter resistance of Petitioner's efforts to vacate the Board's affirmance of such deficiency; and finally—after the Board's affirmance of the $36,116.86 deficiency had been vacated—the time required for the Board to distort the true facts of Petitioner's defense, against the $28,260.61 residue of such deficiency, in such manner as to pretendedly support its predetermined decision to hold Petitioner bound by the falsely stated facts fraudulently stipulated by the conspirators, and also to hold Petitioner liable for tax on his income that had been extorted from him by the Secretary—all of which was charged by Petitioner (R. 6-23), none of which was denied by Respondent in the Trial Court, all of which Petitioner abundantly proved by documentary and oral evidence (reflected by the entire Record), none of which Respondent attempted to refute or to disprove—except by suppressing additional documentary evidence in its exclusive custody and the oral testimony of witnesses under its control.

On page 3 of Respondent's Brief appears the following:

> **"On December 6, 1946, there was paid by a third person the sum of $350 for application on the tax liability of the taxpayer, leaving an unpaid balance of $53,783. (R. 29) This balance, plus interest, is still unpaid. (R. 29)"**

The quoted sentence ending with "$53,783" is an excerpt from Finding II of the Trial Court and omits the language that immediately follows, to-wit:

> **"* * * which payment was made without the knowledge or consent of O. O. Owens who refuses to accept credit therefor."**

Why was a period substituted for the comma immediately following the figures "$53,783," and the balance of the Finding, "which payment was made without the knowledge or consent of O. O. Owens who refuses to accept credit therefor." omitted from Respondent's Brief if not for the purpose of trying to mislead this Court by making it appear Petitioner had accepted the benefit of such unauthorized payment by a third person, and, in consequence, had ratified the asserted deficiency.

The significance of such omitted language is greater than appears from the excerpt, quoted by Respondent, standing alone. It is as typical of the conduct of the Commissioner of Internal Revenue, his officers, agents, attorneys and other representatives from the inception of this case in 1921—particularly throughout all proceedings before the Board and before the courts—as the forgery committed by an Assistant Chief Counsel for the Commissioner, demonstrated by Exhibit "A" to Petitioner's Petition filed herein. It is also an attempt to duplicate the impression created by the maliciously false statement, "the taxpayer admitted the allegations of the complaint * * *" on pages 6 and 7 of Respondent's Brief filed in the Court of Appeals, which statement was adopted by that court and embodied in its opinion notwithstanding Petitioner in his Reply Brief specifically called that court's attention to the falsity of such statement and that its purpose was to make it appear Petitioner had thus confessed judgment.

On page 4 of Respondent's Brief appears the following:

> **"The case turns on its own peculiar facts. No general question of importance is raised which calls for further review."**

Respondent concedes the facts are "peculiar." The conspiracy, and frauds perpetrated pursuant thereto, are no doubt unique—and were effective. What about the denial of due process? That is certainly a general question of importance—at least important to all except conspirators, and only an inconvenience to them.

But, there IS ALSO RAISED another general question of importance, supposedly long settled, which calls for further review. That question is: May Public Officers connive with rogues to rob a citizen of his property, may they exercise a veto upon the means employed for their detection, and may Respondent retain the benefits of a judgment or deficiency obtained by the conniving of its officers with rogues and by the frauds perpetrated by them?

The "peculiar" facts of this case and the Court of Appeals' opinion certainly call for further review unless Petitioner is to be subjected by Respondent to peculiar law applied to the admitted "peculiar" facts.

Respondent's position is that since the facts of this case are peculiar and unique and may probably never be duplicated no general question of importance is raised; that it should be permitted to retain the benefits of the frauds of its officers, attorneys and other representatives, and until and unless its officers, attorneys and other representatives make a practice of duplicating the identical frauds on all taxpayers no general question of importance will be raised —that isolated, peculiar frauds perpetrated upon isolated individual taxpayers by Government Officials should be permitted to stand unredressed even though the frauds deny due process.

On page 5 of Respondent's Brief appears the following:

> "Ultimately, the sole issue presented to the Board for its decision relating to the 1920 case was whether taxpayer was entitled to a certain deduction from gross income for that year. (R. 610, 619) The decision of the Board denying the deduction was rendered *upon a full hearing had before it,* at which a new stipulation was introduced (R. 453), as well as evidence both oral and documentary adduced by the taxpayer and the Commissioner (R. 423-550), the taxpayer appearing *pro se, as well as being represented by two lawyers* (R. 424)." (Emphasis mine.)

The word "ultimately" as used by Respondent means the FIFTEEN YEARS' delay heretofore explained. The inference is that the presence of a sufficient number of lawers guarantees a full hearing and due process. The Record discloses (R. 437-476) that at the hearing denominated "a full hearing" in Respondent's Brief, Petitioner was required by the Board to use the "stipulation" fraudulently entered into February 5, 1931, by the second unauthorized attorney and an assistant to the Chief Counsel for the Commissioner; that some of the most material and decisive facts of your Petitioner's defense to the 1920 deficiency had been entirely omitted from the fraudulent stipulation; that other material and decisive facts had been falsely stated in such fraudulent stipulation; but that proof of such omitted facts was supplied by Petitioner, and the false statements of fact were corrected where counsel for the Government would agree, but where agreement could not be reached the true facts were established by documentary and oral evidence; and

That while there were supposedly two lawyers present at the continued hearing and appearing for Petitioner, one, Mr. Hansen, was Petitioner's office manager and accountant, who was present as a witness and testified as to Petitioner's method of accounting and reporting (R. 512); that the other, Mr. Swindler, lived and practiced in Washington, D. C., and had been employed by Petitioner (R. 434) to watch the docket of the Board and to prevent further complications by the appearance and conduct of additional unauthorized attorneys should they attempt to enter the case; that neither Hansen nor Swindler had any knowledge of the facts relating to the deduction of $75,989.20 then in controversy nor of the transaction out of which such claimed deduction arose, and

That your Petitioner was the only person, then living, who was familiar with those facts, who had a clear recollection of them and, in consequence, was in position to interrogate witnesses about matters ancillary to or relating to those facts, and who could testify to the facts which Petitioner could not establish by documentary evidence because of the absence of Petitioner's records—which had been stolen or surreptitiously removed from the files and custody of his former attorney of record and none of which, then, nor since, have ever been returned to your Petitioner.

The Record (620-623) also discloses that after the aforesaid hearing was concluded the Board ignored the true facts thus adduced and established by documentary evidence as well as by oral testimony—and in writing its opinion based its decision, in part, (R. 621-623), upon some of the identical falsely stated facts previously fraudulently stipulated by the second unauthorized attorney pretending to represent your Petitioner and by an assistant to the Chief Counsel for the Commissioner of Internal Revenue.

A full hearing requires not only the opportunity to present all the evidence but also giving consideration to and deciding the case upon all such evidence. In the hearing, denominated a "full hearing" in Respondent's Brief, Petitioner was deprived of the opportunity of offering his records that had theretofore been stolen from his former attorney of record and which had never been returned to him. Notwithstanding, in the absence of such records, your Petitioner, by collateral evidence, proved and demonstrated the true facts, such evidence was entirely ignored by the Board. Therefore, to all intents and purposes, such hearing denominated "a full hearing" might as well never have been held and that farcical proceeding could as well have been dispensed with, and the Board could as well have used

the language of the attorney for the Commissioner with reference to the fraudulent stipulation and his insisting that it be used, to-wit:

> "We stipulated these facts before. If it is good enough for one case it is good enough for this case. The fact of the matter is in docket No. 14379 I think Your Honor will find that stipulation in the file." (R. 437)

Also on page 5 of its Brief in Opposition Respondent states:

> "He contends *that in some way* he was denied his day in court because of fraud and conspiracy between Secord and representatives of the Government." (Emphasis mine.)

Petitioner does not make, and has never made, the contention he was "in some way" denied his day in court.

On the contrary, the Record discloses Petitioner proved, in proper sequence and step by step, the conspiracies, and the frauds perpetrated pursuant thereto, to deprive and defraud your Petitioner of a hearing, or opportunity to be heard, in defense against such deficiency (R. 355-411, 620-623); that at all times up to March 26, 1940 (R. 357-359) your Petitioner, in the absence of proof to the contrary, had proceeded upon the belief that the deficiency had previously been sustained by the Board of Tax Appeals as a result of accident, confusion, inadvertence and mistake (R. 765-767), and had presented his defense to the deficiency accordingly; but

That, on March 26, 1940, Petitioner discovered convincing proof (R. 357-359) that he had previously been deprived and defrauded of a hearing and an opportunity to be heard, and had been deprived and defrauded of an opportunity to present the true facts of his defense as a result

of conspiracies between unauthorized attorneys pretending to represent Petitioner and attorneys for the Commissioner of Internal Revenue, and also as a result of conspiracy between the officers, agents, attorneys and other representatives of the Commissioner; and that all the prior acts of such unauthorized attorneys and attorneys for the Commissioner resulted and flowed from perfectly designed and well concealed conspiracies to deprive and defraud your Petitioner of an opportunity to present, and to have considered by the Board, the true facts of his defense;

That notwithstanding your Petitioner, upon discovery of such convincing proof, immediately sought leave to reopen the case and to offer proof of such conspiracies and frauds before the case was decided by the Board (R. 357-359), such leave was denied and thereafter the Board, in part (R. 621-623), based its opinion upon the identical falsely stated facts fraudulently stipulated by the second unauthorized attorney pretending to represent your Petitioner and an assistant to the Chief Counsel for the Commissioner (R. 376-385).

There was no vague, uncertain and indefinite characterization by Petitioner that he was "in some way" denied his day in court. Instead there was positive proof of the conspiracies and the frauds perpetrated pursuant thereto which deprived and defrauded your Petitioner of his day in court. Nowhere in the Record does there appear any denial by Respondent of the allegations of such conspiracies, collusion and frauds. Instead, Respondent moved to strike such allegations, "All upon the grounds and for the reasons that the same is redundant, immaterial, impertinent and scandalous." (R. 19-20)

Moreover, Respondent offered no evidence in an attempt to refute Petitioner's oral and documentary evidence

which proved and demonstrated such conspiracies and frauds, which were effectuated, and which deprived and defrauded your Petitioner of his day in court.

Moreover, Respondent suppressed documentary records, some of which were your Petitioner's own records that had been stolen or surreptitiously removed from the files of his former attorney of record, and suppressed the oral testimony of witnesses, all of which evidence would have more conclusively established the existence, the intent and purpose of the conspiracies, the frauds perpetrated upon Petitioner pursuant thereto and the effect of those frauds of depriving and defrauding your Petitioner of his day in court.

On page 6 of the Brief in Opposition Respondent states:

> "The Board denied the deduction upon the ground that taxpayer was on the cash basis of accounting and was not entitled to a deduction since the money alleged *to be paid was not paid in the taxable year;*" (Emphasis mine.)

That quoted statement refers to another fraud perpetrated by the Board in its memorandum opinion (R. 253, 261, 620-621). Notwithstanding Petitioner for all years prior and subsequent to 1920 was on the accrual basis of accounting—and of reporting income for taxation and had never sought leave to change and had never been changed by the Commissioner from the accrual to cash basis of reporting (R. 477-550)—the Board held Petitioner bound by an obvious typographical error on the face of Petitioner's incomplete tentative returns, which were qualified in every conceivable manner and filed with an explanation that they were incomplete and incorrect and reserving the right to file a completed, correct amended return (R. 257, 85-86), and

Notwithstanding Petitioner's books for 1920 had been submitted in the first part of the 1939 hearing by Petitioner's accountant, Mr. Hansen, and had been thoroughly examined by Respondent's attorneys and other representatives (R. 411-423), and

Notwithstanding such books showed they were kept on accrual basis, and—except the deduction of the $75,989.20 extorted from Petitioner, which was not presented by Hansen in the first part of the hearing because of his lack of knowledge of the facts and because of Petitioner's illness and absence—all deductions raised in Petitioner's original Petition filed in 1926 with Board, and two deductions or issues not raised therein were allowed (R. 411-423)—which reduced, to $28,260.61, the previously asserted deficiency of $36,116.86, and

Notwithstanding, in the continued hearing held in November, 1939, all the evidence with reference to books, to accounting and reporting income related to the business, books and reporting by the partnership of Gayer and Owens, as partners, and as individuals for 1919 and prior years—and such evidence established the fact that for 1919 and all prior years Petitioner was on the accrual basis of accounting and reporting (R. 423-550)—

Nevertheless, the Board (R. 620) first found and concluded Petitioner kept NO books for 1920; then by interlineation corrected such finding to recite "no PROPER books" were kept, and

To sustain the first finding of NO BOOKS, the Board referred to the testimony at the continued hearing (R. 423-550) about the partnership books for 1919 and prior years —which partnership had been dissolved twenty years and its books and records scattered, lost or destroyed—as

"No books of account are in evidence which would

bear on petitioner's contention, and the records which were mentioned at the hearing, though not produced, do not give an indication that they were kept either as regular books of account or on an accrual basis. Consequently respondent's contention must prevail." (R. 620-621), and—

The Board, by such legerdemain, ignored not only the established true facts but also ignored its own finding of the extortion—the award of additional moneys out of the impounded funds to Martha Jackson in 1920—and, to arrive at its predetermined decision to deny the deduction, held Petitioner's 1920 RETURN was not on the accrual basis (R. 619).

Notwithstanding the Board in its opinion (R. 620) found the substance of the 1920 stipulation as "(which awarded additional moneys out of the impounded funds to Martha Jackson)" and thus found payment of the extortion to have been made by Petitioner in 1920, in complying with the Secretary's unlawful and void order, and

Notwithstanding the receiver thereafter held more in trust for Martha Jackson and held correspondingly less in trust for Petitioner and his associates, Brazell and Johnson, and

Notwithstanding after execution of "the 1920 stipulation (which awarded additional moneys out of the impounded funds to Martha Jackson)" (R. 620) Martha's legal representative (Parmenter) and two others—McKinney, the illegally appointed interloper-guardian (R. 215-216), and the Secretary of the Interior, both claiming the right to administer Martha's estate (Deft. Ex. 18, R. 231-245; Deft. Exs. 3 to 13, incl., R. 199-214)—asserted or exercised dominion, supervision or control of such "additional moneys awarded out of the impounded funds to Martha Jackson"—

Merely because the receiver, as one trustee for Martha, did not, until 1922, DISTRIBUTE the assigned or awarded funds to the Superintendent of the Five Civilized Tribes,

as another trustee, by agreement, for Martha—such delay in DISTRIBUTION being caused by the struggle between the contending guardians and the Secretary in which each sought to get possession of and to administer the awarded impounded moneys—

The Board, in its memorandum opinion, capriciously and deliberately confused such DISTRIBUTION in 1922 with the PAYMENT by Petitioner in 1920—"(which awarded additional moneys out of the impounded funds to Martha Jackson)" and held:

> **"It will be observed from the findings of fact, *supra,* that it was not until September, 1922, that the money was paid out of the impounded funds to the Superintendent of the Five Civilized Tribes for the benefit of Martha Jackson. Consequently if petitioner's tax return was compiled on the cash basis for the year 1920, neither a loss nor an expenditure in that year can be claimed since no money was actually paid in that year." (R. 620)**

The award of additional moneys out of the impounded funds to Martha Jackson in 1920 constituted complete payment, free from contingencies, in that year and was therefore deductible in 1920 on either cash or accrual basis of reporting income for taxation—even under the Board's finding that Petitioner's 1920 RETURN was not on the accrual basis.

On the same page of Respondent's Brief appears the following language:

> "* * * the Court of Appeals based its affirmance on the ground that the amount sought to be deducted was a capital outlay and therefore not deductible at all. But, of course, an appellate court is not limited to the grounds given by the lower tribunal. *Helvering* v. *Gowran,* 302 U. S. 238, 239, 245."

By such statement Respondent seeks to skate over and gloss over the true situation.

A final decree rendered in 1919 (R. 183), from which no appeals had been taken, adjudicated your Petitioner and others to be the owners of property and impounded funds involved in litigation brought by the Secretary of the Interior and lost by him throughout all the courts. Approximately one year after such decree was rendered the Secretary arbitrarily and unlawfully promulgated an order (R. 199-201) designed and intended to require an oil company to pay approximately $300,000.00 to a certain Indian as royalty, and attempted to identify such royalty as royalty accrued under the terms of a receiver's lease, which receiver had been appointed at the demand of the Secretary, and under which lease the property had been fully developed and every barrel of oil and every dime of revenue therefrom had been produced—the title which royalty had been finally adjudicated and possession thereof awarded to Petitioner and his associates by the final decree from which no appeals had been taken. (R. 183-198)

The Record (201-252) discloses that the Secretary, by arbitrary exercise of power and by abuse of the power of his office, stopped all further judicial process in that case and, by coercion, extorted from your Petitioner and his two associates more than $200,000.00 of their impounded funds, title to which had been finally adjudicated (R. 183-198).

The Record discloses (353-355) that in its original Answer filed with the Board Respondent raised the issue that the $75,989.20 extorted from Petitioner by the Secretary was a capital investment, in that Respondent claimed it was a part of the purchase price of property; that in the continued hearing before the Board in 1939 Respondent abandoned that issue and stood exclusively upon the contention Petitioner was on the cash basis of accounting and

reporting (R. 423-550), and in consequence thereof the Board in rendering its memorandum opinion expressly refused to consider the issue of capital investment or to find the facts thereof (R. 623);

That nevertheless, on review by the Court of Appeals Respondent raised the issue of capital investment, presented and urged that the $75,989.20 represented:

> "* * * the amount of his share of an increase in the purchase price of an Indian allotment the title to which was then in litigation, which the petitioner and his associates had allegedly agreed to make in that year in compliance with an order of the Secretary of the Interior."

The appellate court seized upon such newly raised issue and without jurisdiction so to do made its own independent findings of fact thereof, avoided deciding the question of law arising out of the facts so found—namely, the invalidity of the Secretary's order—and arbitrarily and capriciously affirmed the Board's decision. (*Owens* v. *Commissioner,* 125 F. (2d) 210.)

The appellate court had no jurisdiction or power to so proceed and its opinion is void on its face. *Rapeer* v. *Colpoys, United States Marshal,* (App. D. C.) 85 F. (2d) 715, 717; *United States* v. *Walker,* 109 U. S. 258, 266, 3 S. Ct. 277, 27 L. ed. 927; *Robinson, et al.,* v. *Elder,* (9th Cir., Nev.) 78 F. (2d) 817, 818; *Reynolds* v. *Stockton,* 140 U. S. 254, 268, 35 L. ed. 464, 468; *Helvering* v. *Rankin, et al.,* 295 U. S. 123, 79 L. ed. 1343; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 82 L. ed. 1346, 1356; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 81 L. ed. 755, 756; *Helvering* v. *Wood,* 309 U. S. 344, 84 L. ed. 796, 799; *Patton, et al.,* v. *Com. of Int. Rev.,* (6th Cir., Ohio) 168 F. (2d) 28; *Ross* v. *Commissioner,* 169 F. (2d) 483, 496; *Levitt & Sons* v. *Nunan,*

(2d Cir.) 142 F. (2d) 795; *Levitt & Sons* v. *Nunan,* (2d Cir.) 160 F. (2d) 209; *Hormel* v. *Helvering,* 312 U. S. 552, 85 L. ed. 1037; *Helvering* v. *Gowran,* 302 U. S. 238, 239, 245.

True, an appellate court is not limited to the grounds given by the Board for its decision, but equally true the appellate court IS limited to the facts found by the Board—and the appellate court has no jurisdiction or power to make its own independent findings of fact or to draw inferences therefrom.

Where the appellate court accepts new grounds or a new theory not urged or tried by the Board, it is mandatory upon the court to remand the case to the Board for hearing of the facts of such new ground or theory.

The case of *Helvering* v. *Gowran,* 302 U. S. 238, 239, 245, cited in Respondent's Brief In Opposition, sustains the foregoing statement and destroys the contention stated on page 6 of Respondent's Brief.

In *Helvering* v. *Gowran, supra,* this Court held:

> "If the Court of Appeals had accepted the theory it would have been open to the taxpayer to urge, in view of the new issue presented that he should have the opportunity to establish before the Board additional facts which would affect the result. As we accept the new theory, leave is granted Gowran to apply to the lower court for that purpose."

Petitioner was afforded no such relief or remedy in this case. He was not given an opportunity to offer his proof on the newly raised issue of capital investment or capital outlay. The appellate court's accepting such newly raised ground or theory, its making its own independent findings of fact, its avoiding a decision of the question of law arising out of the facts so found, and its arbitrarily affirming the

Board's decision, within themselves and standing apart from the acts of all others representing the Commissioner there or Respondent here, was a denial to Petitioner of due process of law, a denial of a full hearing as well as denial of an opportunity to be heard.

In paragraph 2 on page 6, reference is made by Respondent to numerous pages of the Record. Examination of the Record will reveal that such page references are to the oral testimony of witnesses and to comments by Petitioner during the course of the trial. With meticulous care throughout Respondent's entire brief no reference is made to any of the documentary evidence which proved and established the conspiracies, and the frauds perpetrated upon Petitioner pursuant thereto—nor to Respondent's suppression of other documentary evidence and the testimony of witnesses under its control.

On page 7 of Respondent's Brief appears the following language:

> "* * * and the case was subsequently tried alone upon a new stipulation of facts (R. 453-460) and other evidence (R. 423-550). The stipulation which Secord had entered into *was not introduced at this hearing*, and there is nothing whatsoever in the record to substantiate the taxpayer's charge (Pet. 17) that the Board based its conclusion on such stipulation." (Italics mine.)

Petitioner will first discuss the last, or full, sentence in the above-quoted excerpt, which is a false statement.

The Record discloses Petitioner never contended such stipulation entered into by Secord was "introduced at this hearing"—meaning the hearing before the Board in 1939.

But, the Record does disclose (437) that Respondent's counsel stated:

"We stipulated these facts before. If it is good enough for one case it is good enough for this case. The fact of the matter is in docket No. 14379 I think Your Honor will find that stipulation in the file."

and thereafter Petitioner was required to use, but permitted to correct, the so-called Secord stipulation, where corrections could be agreed upon, otherwise Petitioner offered documentary and oral evidence to prove the facts omitted from the so-called Secord stipulation and also to correct the falsely stated facts in such stipulation.

On page 17 of Petitioner's Petition, cited by Respondent, the following language is used:

"Although Petitioner was thereafter ostensibly relieved from the aforesaid frauds and the effect of the fraudulently stipulated, falsely stated facts of his defense and was ostensibly granted a hearing on the merits of his defense, nevertheless, at a later hearing and by its decision the Board held Petitioner was bound by the identical falsely stated facts PREVIOUSLY fraudulently stipulated by the Commissioner's and Respondent's attorneys and the aforesaid second unauthorized attorney, and thus a second time the Board denied Petitioner due process of law." (Emphasis mine.)

As a pretended ground or reason for denying the extortion deduction on the accrual basis of reporting, the Board used the falsely stated facts PREVIOUSLY fraudulently stipulated to conjure up a fictitious contingency on Petitioner's ownership of the assigned, impounded funds.

Such fictitious contingency was the moot appeal of McKinney, the illegally appointed, interloper-guardian (R. 215-226) from an order of the Trial Court—which had entered the final and supplemental decrees (R. 183-198)—denying him leave to intervene, or to disturb those decrees or even to get into the case.

McKinney had no right to intervene or to appeal. His "appeal" was moot. Furthermore, neither Martha nor her legally appointed guardian could appeal because she, in effect, had won the lawsuit. (R. 183-193) Therefore the Secretary could not appeal in his official capacity or for her. He could not act in Martha's or Parmenter's place or stead. (*Mott* v. *United States,* 283 U. S. 747.)

Nevertheless, the Board ignored those record facts, and reached back to, resorted to and used the falsely stated facts PREVIOUSLY fraudulently stipulated as the basis for a fictitious contingency, then used such pretended but fictitious contingency as its reason for denying the extortion-deduction on the accrual basis of reporting.

Such falsely stated facts PREVIOUSLY fraudulently stipulated were stipulated to be the facts of all of Petitioner's appeals pending in 1931 before the Board. The Commissioner appealed from the Board's decision of Petitioner's 1923 case. The appellate court's opinion in that case, *Commissioner* v. *Owens,* is reported at 78 F. (2d) 768.

That case was submitted to the appellate court on the identical falsely stated facts PREVIOUSLY fraudulently stipulated in the so-called Secord stipulation. Among other false statements that stipulation falsely stated (R. 383, par. (w)) appeals were taken from the final decree. Had that statement been true then contingencies would have been created on Petitioner's ownership of his portion of the impounded funds. Since such statement was false no such contingencies existed. That false statement was corrected in the 1939 hearing before the Board (R. 459, par. (w)). In its Memorandum Opinion the Board ignored that correction and substituted language from the opinion in *Commissioner* v. *Owens (supra)* to accomplish the purpose of the false statement (R. 666-667).

The Board's opinion (621-623) itself refutes Respondent's statement:

> "There is nothing whatsoever in the Record to substantiate the taxpayer's charge (Pet. 17) that the Board based its conclusion on such stipulation."

The cited portions (R. 621-623) of the Board's Opinion call specific attention to the Court of Appeals' opinion in *Commissioner* v. *Owens*, 78 F. (2d) 768, and also call attention to the fact that Petitioner's contentions in the 1920 case were inconsistent with the facts as stated in that opinion. The Board made its conclusions square with and conform to that Appellate Court Opinion.

Moreover, the cited portions of the Board's opinion (R. 621-623) show on their face that the Board based and grounded its denial, on the accrual basis, of the extortion deduction upon the appellate court's opinion in ~~*Owens v. Commissioner*~~ v. Owens, *supra*. The Record (pp. 623-665) demonstrates in detail the errors in the Board's Opinion in the 1920 case and the fact that numerous paragraphs thereof were copied verbatim from the appellate court's opinion in *Commissioner* v. *Owens, supra,* and other findings were made therefrom without regard to the true facts proved by Petitioner and established in the Record of the 1939 hearing of Petitioner's 1920 case.

Furthermore, the Record (666-667) shows the changes made by the Board in its Memorandum Opinion, pursuant to Petitioner's motion for reconsideration. Some of such changes show on their face corrections of falsely stated facts contained in the so-called Secord stipulation. Those corrections eliminated the fictitious contingencies on Petitioner's ownership of the impounded funds assigned in 1920 —which the Board (R. 620) found and defined as "(which awarded additional moneys out of the impounded funds to Martha Jackson)". But the Board did not change its conclusions to conform to the corrections.

Such changes also show substitutions of facts stated by the appellate court (R. 667) in *Commissioner* v. *Owens, supra,* for the true facts of the 1920 case proved and established by Petitioner by documentary evidence in the 1939 hearing of the 1920 case—and the statements of fact borrowed by the Board from the appellate court's opinion in *Commissioner* v. *Owens, supra,* were made to serve the Board's purpose of deciding Petitioner did not in 1920 own,

free from contingencies, the funds impounded by the receivers.

The Board resorted to those tractics notwithstanding documentary evidence, staring it in the face, demonstrated that on June 17, 1919, by final decree, from which no appeals were taken, Petitioner was adjudicated to be the lawful owner of and was awarded possession of his portion of the impounded funds (R. 183-198).

No better proof of conspiracy and fraud to deny Petitioner consideration of the true facts of his defense, to deny him a full hearing, to deny due process of law could be imagined.

It would be highly advisable for Respondent's brief writer to carefully examine the Record and Petitioner's Petition before he attempts to distort them.

In conclusion, in support of the immediately foregoing accusation, your Petitioner calls this Honorable Court's attention to the following language at the bottom of page 7 of Respondent's Brief In Opposition, to-wit:

> "Moreover, the short answer to taxpayer's charges of conspiracy and fraud is that the Court of Appeals rejected them in the prior appeal. *Owens* v. *Commissioner,* 125 F. (2d) 210, certiorari denied, 316 U. S. 704, rehearing denied 317 U. S. 704."

A short answer to the above quoted "short answer" is that no issue of conspiracy and fraud was presented to, and therefore could not be rejected by, the Court of Appeals in the prior appeal (*Owens* v. *Commissioner,* 125 F. (2d) 210). This, for the simple reason that—after the evidence was offered but before the Board rendered its opinion Petitioner discovered proof convincing to him that the acts and conduct of the attorneys for the Commissioner of Internal Revenue resulted and flowed from a perfectly designed and

well concealed conspiracy—your Petitioner immediately sought, but was denied by the Board, leave to reopen his case and offer proof of such conspiracies and frauds.

Furthermore, Respondent's statement on page 8:

> "• • • taxpayer's unsupported epithets and allegations do not make out a case of fraud. *Kent* v. *Lake Superior Canal Co.*, 144 U. S. 75, 81."

is utterly groundless. Of course unsupported epithets and allegations do not make out a case of fraud and no authority need be cited in support of that legal axiom.

But, abundant documentary proof of allegations of conspiracy and fraud not denied by Respondent, which proof Respondent made no attempt to refute or to disprove—other than by suppressing additional documentary evidence in its exclusive custody and by suppressing the oral testimony of witnesses under its exclusive control—DOES make out a case of conspiracy and fraud, and no authority need be cited to support that legal axiom.

Respectfully submitted,

O. O. OWENS,
Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 508

O. O. OWENS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 28-30) are unreported. The opinion of the Court of Appeals (R. 796-799) is reported at 177 F. 2d 692.

JURISDICTION

The judgment of the Court of Appeals was entered November 1, 1949. (R. 800.) The petition for writ of certiorari was filed December 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the decision of the Board of Tax Appeals in a prior proceeding (which forms the basis of this suit), redetermining a deficiency in taxpayer's income tax for the year 1920, and its affirmance by the Court of Appeals, were unlawfully entered and void. This in turn depends upon whether the Court of Appeals exceeded its jurisdiction, and whether the District Court, in the present proceeding, erred in finding that the evidence did not support taxpayer's claim of conspiracy (allegedly involving the Commissioner of Internal Revenue and others) to deprive him of his day in court.

STATEMENT

The United States brought this suit (R. 3-5) against taxpayer to enforce collection of deficiency in income tax as determined by the Commissioner of Internal Revenue, and later affirmed by the Board of Tax Appeals and the Court of Appeals for the Tenth Circuit. *Owens* v. *Commissioner,* 125 F. 2d 210, certiorari denied, 316 U. S. 704, rehearing denied, 317 U. S. 704.

The facts as found by the District Court (R. 28-30) may be summarized as follows:

On February 13, 1926, the Commissioner determined a deficiency in the taxpayer's income tax liability for the taxable year 1920, and on that date sent him, by registered mail, a written notice of such determination. Within sixty days thereafter, a petition was filed by the taxpayer with the Board

of Tax Appeals seeking a redetermination of such deficiency. On February 13, 1941, the Board redetermined such deficiency in the sum of $28,260.61. On May 18, 1941, the taxpayer filed a petition for review of the Board's decision with the Court of Appeals for the Tenth Circuit, but filed no bond for a stay of assessment or collection thereof. On May 29, 1941, the Commissioner made an assessment of the sum of $28,260.61 together with interest in the sum of $25,872.39, making a total of $54,133. This was forwarded to the Collector of Internal Revenue for the District of Oklahoma, who on June 3, 1941, gave notice to the taxpayer and demanded payment of the sum of $54,133. On January 13, 1942, the Court of Appeals affirmed the order of the Board, and on February 26, 1942, denied the taxpayer's application for a rehearing. On June 8, 1942, this Court denied the taxpayer's petition for certiorari. (R. 28-29.)

On December 6, 1946, there was paid by a third person the sum of $350 for application on the tax liability of the taxpayer, leaving an unpaid balance of $53,783. (R. 29.) This balance, plus interest, is still unpaid. (R. 29.)

As a defense to this proceeding, the taxpayer sought to show the existence of a conspiracy to deprive him of his day in court, but the District Court found that the evidence did not support such a claim. (R. 29.) The evidence relating to this charge of conspiracy will be stated in the Argument section of this brief.

Upon the foregoing findings, the District Court concluded that the Commissioner's determination of the tax assesment was a final and conclusive adjudication of the taxpayer's tax liability, and that the United States is entitled to judgment. (R. 29, 30.) The Court of Appeals affirmed. (R. 796-800.)

ARGUMENT

The petition for certiorari involves two basic questions: (1) Whether, throughout the prolonged course of the litigation involving taxpayer's tax liability for the year 1920, he has had his "day in court". (2) Whether a conspiracy to deprive him of his rights existed between agents of the Government and attorneys purporting to represent him. It is submitted that these issues were properly resolved against petitioner by both courts below. The case turns on its own peculiar facts. No general question of importance is raised which calls for further review.

1. The decision of the Board of Tax Appeals (upon which the present suit is based), redetermining taxpayer's income tax liability for 1920 (R. 167), was entered on taxpayer's petition for review (R. 347-353) after the proceeding had been restored to the calendar by order of the Board, vacating prior memorandum opinions in so far as they affected this proceeding (R. 409-411). Previously, the Board, upon stipulation, had disposed of this proceeding adversely to taxpayer (R. 385-394), the proceeding having theretofore (pursuant to ag[illegible]e-

ment of counsel (R. 366-367)) been consolidated with two proceedings involving taxpayer's income tax liability for 1923 and 1926. And the Board also denied taxpayer's motion to set aside such adverse disposition. (R. 398-411.)

The reason the Board ultimately vacated its prior orders in the case was that at the time the case was consolidated with the taxpayer's 1923 and 1926 cases and submitted on stipulation covering all three dockets (R. 375-385), it seemed seriously doubtful that one Secord, an attorney who appeared for taxpayer in all three dockets, had any authority whatever to represent him in the 1920 case and to enter into any stipulation which bound him as to that year.

Ultimately, the sole issue presented to the Board for its decision relating to the 1920 case was whether taxpayer was entitled to a certain deduction from gross income for that year. (R. 610, 619.) The decision of the Board denying the deduction was rendered upon a full hearing had before it, at which a new stipulation was introduced (R. 453), as well as evidence both oral and documentary adduced by the taxpayer and the Commissioner (R. 423-550), the taxpayer appearing *pro se,* as well as being represented by two lawyers (R. 424).

The taxpayer unquestionably had ample opportunity to litigate the only controverted issue in the case. He contends that in some way he was denied his day in court because of fraud and conspiracy between Secord and representatives of the Govern-

ment. But there is not the slightest justification for taxpayer's charges of fraud, conspiracy, and collusion, as we shall show in the succeeding paragraphs. Taxpayer also argues (Pet. 24-25) that the Court of Appeals denied him his day in court because it affirmed the Board's decision on a different ground from that given by the Board. The Board denied the deduction upon the ground that taxpayer was on the cash basis of accounting and was not entitled to a deduction since the money alleged to be paid was not paid in the taxable year; the Court of Appeals based its affirmance on the ground that the amount sought to be deducted was a capital outlay and therefore not deductible at all. But, of course, an appellate court is not limited to the grounds given by the lower tribunal. *Helvering* v. *Gowran,* 302 U. S. 238, 239, 245.

2. The District Court found that taxpayer had not made out a case of conspiracy and fraud. (R. 27, 29, 129-131.) This finding was made after the most vague and uncertain but continuously reiterated charges of the taxpayer, made throughout the trial (see, e.g., R. 60, 62, 63, 64, 65, 67-68, 69, 74-75, 90, 95, 96, 97, 107, 110-111, 118, 119, 120, 121-122, 126, 131), of a conspiracy on the part of Government officials and others wrongfully to defeat the taxpayer's alleged right to the deduction, and after the District Court permitted taxpayer to introduce evidence of substantially all the facts relating to the acquisition by him and his associates of

interests in the oil properties in question, including the record of the consequent litigation, and also substantially all of the facts relating to the Commissioner's deficiency determination for the taxable year 1920, including the record of the litigation arising therefrom. No other finding would have been supported by the record.

Taxpayer contends (Pet. 8-10, 16-17) that because of the conspiracy involving Secord, he was prevented from presenting his defense to the deficiency asserted by the Commissioner for 1920. But, as has been shown, the Board vacated (R. 409-411) its decision (R. 366-367) based upon the agreement to consolidate the 1920, 1923, and 1926 proceedings and upon the stipulation of facts (R. 375-385) entered into on behalf of taxpayer and the Commissioner, so far as it concerned the 1920 case; and the case was subsequently tried alone upon a new stipulation of facts (R. 453-460) and other evidence (R. 423-550). The stipulation which Secord had entered into was not introduced at this hearing, and there is nothing whatsoever in the record to substantiate the taxpayer's charge (Pet. 17) that the Board based its conclusion on such stipulation.

Moreover, the short answer to taxpayer's charges of conspiracy and fraud is that the Court of Appeals rejected them in the prior appeal. *Owens* v. *Commissioner,* 125 F. 2d 210, certiorari denied, 316 U. S. 704, rehearing denied, 317 U. S. 704. Secord's letter to taxpayer (R. 772-777) merely confirms the correctness of the District Court's finding. It is,

of course, true that in a proper proceeding, upon proper allegation and proof, a court of equity will set aside a judgment obtained by fraud extraneous to the record. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238; *United States* v. *Throckmorton*, 98 U. S. 61. But taxpayer's unsupported epithets and allegations do not make out a case of fraud. *Kent* v. *Lake Superior Canal Co.*, 144 U. S. 75, 91.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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THERON LAMAR CAUDLE,
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ELLIS N. SLACK,
EDWARD J. P. ZIMMERMAN,
Special Assistants to the Attorney General.

JANUARY, 1950

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 871329 494

IN THE SUPREME COURT OF THE UNITED STATES.
October Term 1949.

No. 508

O. O. OWENS, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION *for* REHEARING.

Your Petitioner, O. O. Owens, respectfully asks this Honorable Court to grant a rehearing and to reconsider his Petition for Certiorari requiring the United States Court of Appeals for the Tenth Circuit to certify to this Court for its review and determination the case of *O. O. Owens, Appellant,* v. *The United States of America, Appellee,* No. 3870, on the docket of said United States Court of Appeals; and in support thereof your Petitioner states:

Since Petitioner's Petition clearly presented for this Court's consideration flagrant denials to Petitioner of due process of law by Respondent, by its officers, agents and attorneys, by the Board of Tax Appeals and by the United States Court of Appeals, the facts of which were not denied or attempted to be refuted by Respondent, and—

Since no written opinion was promulgated indicating the basis and reasons for denying on February 13, 1950, the Petition for Certiorari filed herein December 29, 1949—

Petitioner can only assume that such denial of his Petition was predicated upon the policy of this Court as outlined, defined and explained in the address delivered September 7, 1949, to the American Bar Association by the Honorable Chief Justice of the United States, wherein the Honorable Chief Justice is reported to have, in part, stated:

> "* * * To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country. * * *"

Obviously Respondent extended and enlarged the policy stated by the Honorable Chief Justice, as evidenced by the statement on page 4 of its Brief in Opposition filed herein, to-wit:

> "* * * The case turns on its own peculiar facts. No general question of importance is raised which calls for further review."

Apparently this Court accepted Respondent's view and contention, as conforming to this Court's policy, for denying Petitioner's Petition herein.

Amendment V to the Constitution, in part, reads:

> **"NO PERSON shall * * * be deprived of life, liberty, or property, without due process of law; * * *." (Emphasis mine.)**

Said Amendment does not contain the qualification, sought to be applied by Respondent, that it applies only to all persons collectively and generally, nor that the ag-

grieved person must be one of a class nor that his constitutional rights will be protected only in a class action.

Said Amendment recognizes and makes the rights of each individual of equal importance to the rights of a class of individuals, because the denial of due process to any person would countenance and quickly lead to a denial of that right, not only to classes of persons, but to ALL PERSONS.

Said Amendment V, and in fact the entire Constitution with all Amendments thereto, was designed and intended to prevent the creation of classes of persons with rights superior to those of the individual person. As part of the Bill of Rights it was designed and intended to protect the rights of the individual person, not the rights of classes of persons.

The language of Amendment V is perfectly clear. That language was designed to, and intended to, and if followed will protect the private rights of the individual person without regard to whether a judicial decision involving due process of law affects the rights of all persons generally, or of a class of persons, or of any one else whomsoever.

The denial of due process to an individual person is *ipso facto* the denial of the right of due process to every person and to every class of persons.

The peculiar facts out of which the denial of due process in the instant case arises are of general importance. But, the important question is: Was the individual person denied due process of law?

If Petitioner was denied certiorari upon Respondent's contention, Brief 4,

> "* * * The case turns on its own peculiar facts. No general question of importance is raised which calls for further review.",

then, apparently such denial of certiorari was based upon the assumption that the admitted peculiar facts would not affect the rights of classes of persons, or the rights of all persons generally—without considering whether due process had been denied Petitioner.

Every case has its own peculiar facts and is supposed to turn upon those facts. If this be the basis of the denial of certiorari in the instant case, does it mean that the constitutional right to due process, of an individual person, may be denied with impunity merely because the admitted peculiar facts affect the private rights of the individual person only, or because the identical peculiar facts are not common to all persons generally, or to a class of persons?

Does it further mean that this Court will not enforce Amendment V to protect the right to due process of an individual person?

Does it mean that this Court will not enforce the right guaranteed by Amendment V in favor of each person by protecting each person against conspiracies and frauds of public officers and the connivance of such public officers with rogues to rob a person or citizen of his property by depriving him of due process of law—unless such conduct and denial of due process is general as to all persons, or to all persons of a class of which class such person is a member?

Does it mean that the particular frauds and the connivance of public officers with rogues to rob a citizen of his property by a denial of due process of law, as was proved and established by Petitioner in this case and which was not denied or attempted to be refuted by Respondent, must become general against all taxpayers, or against classes of taxpayers, before the constitutional question of denial of due process becomes of sufficient importance to

warrant this Court assuming jurisdiction to correct those abuses?

If it does mean that, then how many individual taxpayers may be robbed of their property by being denied due process through the connivance of public officers with rogues before such denial of due process becomes a general question of importance?

How many individual taxpayers are required to make a class? How many taxpayers must be so robbed before a general question of importance or a class action is created?

If the guaranty of due process provided by Amendment V is to be limited to taxpayers collectively and generally, or to cases only in which the facts are common to all taxpayers collectively and generally, or to classes of taxpayers, does not the denial of due process to one person or to one member of a class constitute a denial of such right to all other persons, and to all members of that class?

How are classes of taxpayers to be determined? Shall it be by race, color, creed, state of opulence, degree of poverty, political beliefs, or the amount of tax paid or sought?

Does it mean taxpayers are to be classified according to the peculiar facts of their cases? Or, must the facts of each taxpayer's case be common to the facts involved in all other cases of taxpayers, or all others of the same class?

All taxpayers are of a class. Each is equally affected by the denial of due process to one of them.

If taxpayers are to be considered as classes and the rights of some classes protected and the rights of other classes denied, may a member of the unfavored class move over to the favored class, and if so, how? And who does the classifying? Is the classification made by the peculiar facts of each case as contended by Respondent? If the facts

of a particular case are "peculiar" does that determine a taxpayer's classification and warrant denial of due process of law?

If the constitutional rights of the individual person or citizen is not a general question of importance that will cause this Court to assume jurisdiction, then the correlative rights of all individual persons and citizens of the United States will likewise not raise a general question of importance sufficient to cause this Court to assume jurisdiction.

This can only mean that the constitutional rights of all persons and citizens of the United States, as well as of all classes of persons and citizens, may be completely destroyed so long as those constitutional rights are invaded, are violated and are denied such persons and citizens separately.

In short, may an individual taxpayer be robbed with impunity by public officers denying him due process of law, or must all taxpayers be so robbed collectively upon a particular state of facts before a general question of importance is raised sufficient to warrant review by this Court?

In the above mentioned address of the Chief Justice to the American Bar Association he is also reported to have stated:

> "* * * All other cases come within the Court's discretionary jurisdiction, and as has been the custom for some years past, the Court takes such cases only when at least four justices feel that the public importance of the question presented requires its consideration by the Supreme Court."

Surely there must be four justices of this Court who feel that the public importance of the question of denial of due process—whether by the connivance of public officials

with rogues, or otherwise—is sufficient to cause this Court to give consideration thereto.

In the aforesaid address, the Honorable Chief Justice is also reported to have stated:

> "* * * Lawyers might be well-advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them. * * * What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations. A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court."

Can there conceivably be a question of wider import, of greater general importance, of more extensive practical effect and of more serious consequences for other litigants in other situations than the denial of due process to any person, when such right is guaranteed to every person by Amendment V to the Constitution.

If due process may be denied to any one person may it not and will it not also be denied to every person—individually or by classes?

If the preservation of the right to due process to each person—or to classes of persons—requires resolving conflicts of opinion on federal questions that have arisen among lower courts and requires the exercise of supervisory power over lower federal courts, then the reason is all the greater and more important why this Court should, in the exercise of its discretion, consider and review questions presenting denial of due process in violation of Amendment V.

Due process as guaranteed by Amendment V, was intended to protect the rights of each person, not only against

the encroachment of other persons, but also against the encroachments of the government itself.

Since the government is charged with the preservation of those rights and the protection of each person's enjoyment of those rights, it follows that in the instant case it was and is as much the duty of Respondent, as it is the duty of this Court, to protect Petitioner's right to due process as to collect revenue desired or sought.

Amendment V to the Constitution is not limited to cases between private persons or classes of persons. It makes no exception of cases involving denial of due process by the government, its agents or officials.

Neither does it make exception of cases involving the government's efforts to collect income tax or other revenue. Neither does it make a distinction between persons and taxpayers.

Denial by the government of due process of law to a person is of far wider import and of greater general importance to ALL PERSONS than the denial of such right in litigation between private persons.

Amendemnt V provides:

> **"NO PERSON shall * * * be deprived of life, liberty, or property, without due process of law; * * *." (Emphasis mine.)**

A government which denies due process of law must necessarily be a despotic government.

The denial of one constitutional right to one person is an assertion of the power—without the right—to deny any or all constitutional rights to other persons; and once indulged perforce requires the continual assertion of such power in justification of the first denial, and inevitably will result in repudiation of all constitutional restraints upon all public officers and will produce tyranny and despotism.

What question of more general importance or of wider

import could be presented to this Court? What question could have greater practical effect and more serious consequences upon all persons, whether litigants or taxpayers, than due process, or condoning the denial of due process of law?

Admittedly the collection of revenue is important, but not more so than the preservation of the right of due process.

If due process is to be sacrificed for increased revenues, then all persons and taxpayers have been stripped not only of their constitutional right to due process but also of their property by denial of that right.

Amendment V does not provide that a person may be denied due process of law in the collection of revenue. On the contrary, it restricts the collection of revenue to the limitations of due process of law.

Due process may not be exchanged for revenue, nor may the collection of revenue be substituted for due process.

These matters were appropriately presented in and by Petitioner's Petition for Certiorari and Brief in Support Thereof, and in Petitioner's Reply to Respondent's Brief in Opposition, in the instant case.

Petitioner is entitled to a re-examination and reconsideration of said Petition for Certiorari and Brief in Support Thereof and his Reply Brief to Respondent's Brief in Opposition, as well as this Petition for Rehearing, to the end that this Court fully understand, not only in what respect the constitutional rights of Petitioner have been violated, but also the grave and far-reaching effect such denial of due process of law will have on all persons and taxpayers.

In short, will this Court grant relief in this case where a person has been denied due process of law by the government, its agents and officials? Will this Court say that the government may substitute the collection of revenue for due process of law?

Will this Court say that due process may be denied or extinguished for the purpose of collecting revenue?

If the violation of the constitutional rights of one person is not of sufficient importance to cause the Court to assume jurisdiction, then why does Amendment V say:

> **"NO PERSON shall * * * be deprived of life, liberty, or property, without due process of law; * * *." (Emphasis mine.)**

Do the words "NO PERSON" mean something other than "no person"? No! Does Amendment V exclude the Government, its officers and agents? No! Does it exclude the collection of revenue, or the attempts or pretenses of its officers and agents to collect "revenue"? No!

Petitioner's Petition for Certiorari comes squarely within and is completely encompassed by Amendment V. It fully and completely presents a general question of importance calling for further review by this Court—notwithstanding Respondent's contention to the contrary and the admitted peculiar facts. It also meets all the qualifications, the limitations, the restrictions and the requirements of the policy of this Court with respect to granting certiorari, as outlined and defined by the Honorable Chief Justice (*supra*).

Respectfully submitted,

O. O. Owens, *Petitioner.*

CERTIFICATE.

Petitioner, O. O. Owens, hereby certifies that the attached Petition for Rehearing presents substantial grounds available to Petitioner not previously presented or urged, is restricted to such grounds, and is herewith presented in the utmost of good faith for this Court's consideration; and said Petition for Rehearing is not presented for delay or for delay only.

.....,
O. O. OWENS,
Petitioner.

Subscribed and sworn to before me, the undersigned Notary Public, this 21st day of February, 1950.

(Seal)

.....,
WM. G. TOBLER,
Notary Public.

My commission expires January 16, 1954.